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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. ~~77~~ - 834

MORTON FUNGER
HERMEN GREENBERG
ALBERT H. SMALL
RALPH OCHSMAN
SAMUEL P. COHEN

Petitioners,

v.

MONTGOMERY COUNTY, MARYLAND, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioners pray that this Court issue a Writ of Certiorari to review the Opinion and Order of the Court of Appeals of Maryland entered in this case on July 15, 1977.

OPINIONS BELOW

The case before the Court of Appeals of Maryland was captioned *Montgomery County, Maryland, et al. v.*

Woodward & Lothrop, Inc., et al., No. 104, September Term, 1976. Petitioners herein were appellees – cross-appellants before the Court of Appeals of Maryland. This case has not yet been reported in the Maryland Reports. It has been reported in the Atlantic Reporter, Second Series, as *Montgomery County, Maryland v. Woodward & Lothrop, Inc.*, 376 A.2d 483 (Ct. App. Md. 1977) [hereinafter cited as Opinion Below]. The Opinion of the Court of Appeals is reproduced in Appendix A. The Opinion of the Circuit Court for Montgomery County, Maryland entered July 15, 1976 is reproduced in Appendix B.

JURISDICTION

The Opinion of the Court of Appeals of Maryland was filed on July 15, 1977. On September 15, 1977 Chief Justice Burger signed an order extending Petitioners' time in which to file this Petition to and including December 12, 1977. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1257.

QUESTION PRESENTED

What is the Constitutional standard of procedural due process to which a zoning body must adhere when it takes "zoning action denigrating the use or depreciating the value of land,"* that is, when it downzones property?

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*City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 679, 49 L.Ed.2d 132, 141 n. 13 (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES

A. Constitutional Provisions

The Constitutional provisions involved are the portion of the Fifth Amendment to the Constitution of the United States which provides:

> "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

and the portion of the Fourteenth Amendment to the Constitution of the United States which provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

B. Statutes

The portions of the Montgomery County Code, 1972 Edition, as amended, involved are §59-204 and §59-207. They are set forth in Appendix C.

STATEMENT OF THE CASE

Summary

On July 16, 1974, the Montgomery County Council adopted Resolution 7-1849, which granted a sectional map amendment implementing the Friendship Heights Sector Plan of June 1974 (Sector Plan). By Resolution 7-1849, the Montgomery County Council downzoned 41 acres of land at Friendship Heights, Montgomery County, Maryland. Petitioners own an unimproved 18-acre tract known as the "Bergdol Tract," of which approximately 3.5 acres were downzoned.

The downzoning "sharply reduced the densities and floor areas that could be built" on Petitioners' and other property, Opinion Below, 376 A.2d at 481. This reversed most zoning and planning decisions of the previous decade for the Friendship Heights area.

The 1964 General Plan

In 1964, the Maryland-National Capital Park and Planning Commission (Md-NCPPC), with the approval of the Montgomery County Council, adopted a General Plan, "On Wedges and Corridors," for the physical development of the Maryland-Washington Regional District, which encompassed, with minor exceptions, all land in Prince George's and Montgomery Counties. The General Plan called for the creation of five central business districts (CBD) in Montgomery County. The Friendship Heights CBD was one of those five central business districts, located at the high density urbanized base of the northwest development corridor in Montgomery County.

The October 1970 Bethesda-Chevy Chase Master Plan

The General Plan was refined by approval and adoption of a local master plan for the 22-square mile Bethesda-Chevy Chase Planning Area, which included the Friendship Heights CBD, in October, 1970 (The BCC Master Plan). The BCC Master Plan recognized that the Friendship Heights CBD would magetize additional office and commercial uses upon the opening of its projected rapid rail transit station. Consequently, the BCC Master Plan recommended further intensification of development in the Friendship Heights CBD,

expansion of the CBD boundaries, and development of new central business district (CBD) zones in the text of the Montgomery County Zoning Ordinance.

The BCC Master Plan recommended that then existing zoning be retained until new zones for the CBD could be developed and implemented. Existing zoning at that time was primarily high density commercial, and some high density residential, with no density limitations in either zone. Extensive development had already taken place under existing zoning. By virtue of applicable nonconforming use provisions (i.e., saving provisions), the sectional map amendment affected development on only 24 of the 41 acres downzoned. Opinion Below, 376 A.2d at 495.

The BCC Master Plan called for preparation of a "detailed development plan" for all developable property within the Friendship Heights CBD. The Sector Plan is the "detailed development plan." Opinion Below, 376 A.2d at 491.

September 4, 1973 Adoption of New CBD Zone Text Amendment

After approval and adoption of the BCC Master Plan, the Montgomery County Council and Md-NCPPC proceeded to develop the new CBD zones and the detailed development plan. CBD zones were adopted by the Council on September 4, 1973 in the form of a zoning text amendment. Those zones were significantly more restrictive than existing zoning in the Friendship Heights CBD, and therefore, by implication significantly more restrictive than what had been contemplated by the BCC Master Plan.

The June 1974 Sector Plan and the May 28, 1974 CBD Boundary Amendment

The next two actions took place simultaneously. They were development of the Sector Plan and adoption of a zoning text amendment (the CBD boundary amendment) which contracted the Friendship Heights CBD in accordance with the recommendations of the Sector Plan. The Montgomery County Council adopted both the Sector Plan and the CBD boundary amendment on May 28, 1974. The CBD boundary amendment removed Petitioners' property from the Friendship Heights CBD.

Public hearings were conducted on drafts of the Sector Plan in February and March of 1973, and in February of 1974. Opinion Below, 376 A.2d at 489-90. Those hearings were not conducted as record hearings for the purpose of adducing evidence required to support the decision reached. No cross-examination was allowed. Time limits were imposed on property owners who appeared.

Hearings on the CBD boundary amendment were included in the February 1974 hearings on the Sector Plan. The County Council did not conduct separate hearings on the CBD boundary amendment. Again, these were not hearings at which evidence had to be adduced to support adoption of the text amendment.

The Sector Plan reversed many of the essential objectives of the BCC Master Plan. The Sector Plan called for contraction, rather than expansion, of the Friendship Heights Central Business District. It recommended implementation by zoning map amendment of the new, more restrictive CBD zones. Implementation of those zones would result in sigificant downzoning of

property. This, together with contraction of the CBD, would preclude the intensification of commercial and office development called for in the BCC Master Plan and permitted under the zoning then in effect.

1974 County Council Work Sessions

The County Council had deliberated on the Sector Plan and the CBD boundary amendment at five work sessions conducted between February and May of 1974. The County Council and the representatives of Md-NCPPC considered each individual developable parcel in the Friendship Heights Central Business District, in minute detail on a parcel by parcel basis, and allocated permissible height, density, and use – the essential elements of regulation by zoning.

Total permissible traffic generation was selected by the Montgomery County Planning Board and the County Council for each parcel in Friendship Heights. At no time did property owners have an opportunity to cross-examine staff members of the Planning Board who developed traffic figures. Nor did property owners have an opportunity to challenge allocation of density to their property on the basis of its presumed generation of traffic, except by rebuttal evidence at the later sectional map amendment hearings.

The hearings on the Sector Plan and the CBD boundary amendment had been merely general, information gathering, hearings, not conducted on an official record required to support any decision reached, and not including swearing and cross-examination of witnesses. Yet the operative land use decisions were made at the work sessions, after these hearings, and before the hearings on the sectional map amendment.

The Sectional Map Amendment

Adoption of the sectional map amendment is the zoning action challenged herein. It implemented the CBD zone text amendment and the detailed Sector Plan and downzoned Petitioners' and other property. The County Council conducted the sectional map amendment hearings on July 8 and July 13, 1974. Under the Montgomery County Code, 1972 Edition, as amended, §59-207, Appendix C, these hearings must be conducted on an official record, and any decision must be based exclusively on the merits of the evidence of that record. The Court of Appeals described the proceedings as follows:

> "The Council advised all property owners within the CBD a week prior to the hearing that time limitations would be imposed for the presentation of oral testimony – 8 minutes for property owners, 6 minutes for the special taxing districts, and less for civic associations and individuals. The Council also announced that it would not allow cross-examination of speakers, although it would at the conclusion of all testimony provide time for rebuttal by any previous speaker wishing to challenge or correct prior statements or material. *Timely objection to this procedure was made by the appellees* [*including Petitioners Funger, et al.*]. Twenty-five witnesses testified at these hearings and the entire record of the public hearings on the preliminary and final draft sector plan was made a part of the record. After holding a final work session, the Council adopted Resolution 7-1849 on July 16, 1974, granting the sectional map amendment." Opinion Below, 376 A.2d at 490-91 (emphasis added).

As indicated, Petitioners timely raised the procedural question concerned here, at the hearings before the Montgomery County Council.

The downzoning action had the following effect:

> "It assigned new zoning classifications to all properties within the CBD [as well as to Petitioner' property outside the CBD] which regulated the height, area and use of permissible development and thereby *sharply reduced the densities and floor areas that could be built.*" Opinion Below, 376 A.2d at 487 (emphasis added).

This is "zoning action denigrating the use or depreciating the value of land" spoken of in *Eastlake v. Forest City Enterprises, Inc., supra.*

The entire record for the Sector Plan and the CBD boundary amendment was placed into the record for the sectional map amendment. The record on the sectional map amendment was one which, by statute, if not by Constitutional law, must support the decision reached. Yet the bulk of that record consisted of the record in an entirely different type of proceeding–a record not compiled on the basis that it must support the decision reached. No confrontation or cross-examination of witnesses was permitted in the course of the compilation of either record.

Judicial Review

In accordance with applicable law, the judicial review of the sectional map amendment was conducted as a record appeal to the Circuit Court for Montgomery County, exclusively on the record of proceedings on the sectional map amendment before the County Council.

There was no trial, but rather a review solely to determine whether the decision of the County Council was based on the substantial evidence of record. See *Aspen Hill Venture v. Montgomery County Council,* 265 Md. 303, 289 A.2d 303 (1972). *See, e.g., Board of County Commissioners v. Oak Hill Farms, Inc.,* 232 Md. 274, 192 A.2d 761, 764 (1963).

The Circuit Court reversed the adoption of the sectional map amendment on the bases that cross-examination had been improperly denied at the sectional map amendment hearings and that time limits imposed upon property owners were so restrictive as to preclude them from meaningful participation in the compilation of the record necessary to support any decision. The Court of Appeals summarized the holding of the Circuit Court as follows:

> "In reversing the Council's resolution granting the sectional map amendment, the lower court held that the Council's refusal to permit cross-examination at the sectional map amendment hearings, or to afford property owners sufficient time to present evidence, violated §§59-204 and 59-207 of the County Code, as construed in *Hyson v. Montgomery County,* 242 Md. 55, 217 A.2d 578 (1966), without regard to whether the rezoning was local (piecemeal) or comprehensive." Opinion Below, 376 A.2d at 492.

The Circuit Court held that cross-examination and reasonable opportunity to be heard had to be provided, even though the zoning action was comprehensive within the meaning of Maryland law. That is, even though the zoning action involved more than one parcel.

> "The court [the Circuit Court] ultimately narrowed its holding; it said that cross-examination need not be extended to the parties in all comprehensive rezoning hearings but 'where comprehensive rezoning is effected by a sectional map amendment which adopts a sector plan and consequently rezones property within a CBD, the District Council must afford to the parties, upon request, a reasonable opportunity for cross-examination.' " Opinion Below, 376 A.2d at 496.

The Court of Appeals of Maryland agreed that Petitioners had a "right to a fair hearing in all respects" on the sectional map amendment, Opinion Below, 376 A.2d at 497, but reversed the decision of the lower Court, holding:

> "Accordingly, we hold that there was no constitutional or other right arising from §§59-204 and 59-207 to cross-examine witnesses at the sectional map amendment hearings involved in this case." Opinion Below, 376 A.2d at 498.

The Court of Appeals of Maryland relied in part upon its interpretation of the recent holding of this Court in *Eastlake v. Forest City Enterprises, Inc.* It said:

> "Indeed, in its most recent pronouncement on the subject, the Supreme Court had indicated that it would not constitute a deprivation of procedural due process if *no hearing* was permitted either in a piecemeal or comprehensive rezoning action. See *Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 96 S. Ct. 2358, 49 L.E.2d 132 (1976). [Other citations omitted.]" Opinion Below, 376 A.2d at 498 (emphasis added).

Petitioners now ask this Court to determine for the first time what procedural due process protections must be afforded to a property owner whose property is downzoned.

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES AN IMPORTANT CONSTITUTIONAL QUESTION IN WHICH THE SUPREME COURT HAS RECENTLY EXPRESSED AN INTEREST, BUT WHICH IT HAS NOT HAD AN OPPORTUNITY TO ADDRESS BECAUSE AN APPROPRIATE CASE HAS NOT COME BEFORE IT.

Summary

At stake in a zoning map amendment proceeding is the Constitutionally protected right to the full use and enjoyment of private property. Although this Court determined the Constitutional standards of *substantive* due process applicable in such proceedings more than 50 years ago in *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 71 L.Ed. 303 (1926), it has yet to decide the question, What is the Constitutional standard of *procedural* due process applicable in zoning map amendment proceedings, and in particular in downzoning proceedings? This case presents that question squarely. The *procedural* due process question, just as the *substantive* due process question, arises under the Fifth and Fourteenth Amendments to the United States Constitution. It is a question which this Court, as the highest Court in the land, should decide.

Reasons For Granting The Writ

Beginning with *Euclid v. Ambler Realty Company*, 272 U.S. 365, 71 L.Ed. 303 (1926), and thereafter, this

Court has had many opportunities to refine the Constitutional standard of *substantive* due process which must be applied when the zoning police power is exercised.* However, the only instance where this Court has considered the Constitutional standards of *procedural* due process applicable in zoning map amendment proceedings was under the unique set of facts arising in *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 49 L.Ed.2d 132 (1976). That case, distinguished from the present one, involved an application of a property owner for new, more liberal use rights, that is, an "upzoning." 426 U.S. at 679, 49 L.E.2d at 141 n. 13. The City Charter of the City of Eastlake required that any proposed changes in land use agreed to by the City Council be approved by a 55% vote in a city-wide

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*See, e.g., *Zahn v. Board of Public Works*, 274 U.S. 325, 71 L.Ed. 1074 (1927) (reaffirmation of settled rule that Supreme Court will not substitute its judgment for that of legislative body where exercise of the police power is fairly debatable); *Nectow v. City of Cambridge*, 277 U.S. 183, 72 L.Ed. 842 (1928) (prohibition of landowner's contemplated use not in furtherance of public health, safety, convenience and general welfare); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L.Ed.2d 797 (1974) (zoning ordinance restricting land use to one family dwellings and prohibiting occupancy of dwelling by more than two unrelated persons was reasonable, not arbitrary, and bore rational relationship to permissible State objective); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L.Ed.2d 310 (1976) (zoning ordinance regulating location of movie theaters on basis of content of their offerings did not violate Due Process Clause of the Fourteenth Amendment on ground of vagueness, nor was it invalid as impermissible prior restraint on free speech under First Amendment); *Moore v. City of East Cleveland, Ohio*, ____ U.S. ____, 52 L.Ed.2d 531 (1977) (housing ordinance limiting occupancy of dwelling unit to members of single family and defining family to include only few categories of related individuals violates substantive due process right of individuals to live together as family).

referendum. In an Opinion by Chief Justice Burger expressing the views of six members of the Court, the Court held that the referendum rezoning decision on an upzoning was properly reserved to the people under the Ohio Constitution, and therefore, the requirement of a referendum in an upzoning case was not a violation of procedural due process.

Chief Justice Burger was careful to distinguish the narrow applicability of the decision. He stated:

> "8. By its nature, zoning 'interferes' significantly with the owners' use of property. It is hornbook law that '[m]ere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning.' 8 E. McQuillan, Municipal Corporations §25.44, 111 (3d ed. 1965). *There is, of course, no contention in this case that the existing zoning classification renders respondent's property valueless or otherwise diminishes its value below the value when respondent acquired it.*" 426 U.S. at 674, 49 L.E.2d at 138 n. 8 (emphasis added).

* * *

"But no challenge of the sort contemplated in *Euclid v. Ambler Realty* is before us." 426 U.S. at 676, 49 L.Ed.2d at 139.

* * *

"*The situation presented in this case is not one of a zoning action denigrating the use or depreciating the value of land;* instead, it involves an effort to change a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought from the City Council. Thus, this case involves an owner's seeking

> approval of a new use free from the restrictions attached to the land when it was acquired." 426 U.S. at 679, 49 L.E.2d at 141 n. 13 (emphasis added).

Had there been a downzoning, the procedures followed would have been Constitutionally deficient. Then, the principles enunciated in the dissents would have been the correct measure of procedural due process. The decision turned on the fact that the property owner was seeking "new use rights." The case did not involve a downzoning action which "sharply reduced the densities and floor areas that could be built." Opinion Below, 376 A.2d at 487.

Yet even though *Eastlake* involved an upzoning, three justices, Justices Powell, Stevens, and Brennan, had difficulty with the procedures followed by the City of Eastlake in considering the merits of the zoning application. They felt that the *Eastlake* case was the one wherein the Court should address the question now raised.

Justice Powell said:

> "This procedure, affording no realistic opportunity for the affected person to be heard, even by the electorate, is fundamentally unfair. The 'spot' referendum technique appears to open disquieting opportunities for local government bodies to bypass normal protective procedures for resolving issues affecting individual rights." 426 U.S. at 680, 49 L.Ed.2d at 141.

His concern is prophetic, in light of the opinion of the Court of Appeals of Maryland that *Eastlake* means that no hearing is required in any type of zoning proceeding. Opinion Below, 376 A.2d at 498.

In his dissent, Justice Stevens stated: "[T]he process of making decisions affecting the use of particular pieces of property must meet Constitutional standards." 426 U.S. at 683, 49 L.Ed.2d at 143. What Justice Stevens said about the procedural rights of a property owner to apply for new use rights applies *a fortiari* to the procedural rights of a property owner whose property is downzoned:

> "*The fact that an individual owner (like any other petitioner or plaintiff) may not have a legal right to the relief he seeks does not mean that he has no right to fair procedure in the consideration of the merits of his application.* 426 U.S. at 682, 49 L.E.2d at 143 (emphasis added).
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> * * *
>
> "*Specialists in the practice of zoning law are unhappily familiar with the potential for abuse which exists when inadequate procedural safeguards apply to the dispensation of special grants. The power to deny arbitrarily may give rise to the power to exact intolerable conditions. The insistence on fair procedure in this area of the law falls squarely within the purpose of the Due Process Clause of the Fourteenth Amendment.*" 426 U.S. at 685-86, 49 L.E.2d at 144-45 (footnotes omitted) (emphasis added).

Adequate procedural safeguards were lacking before the Montgomery County Council, and the result was arbitrary action reversing ten years of zoning and planning decisions in Friendship Heights. None of the evidence before the County Council had been tested properly for its accuracy or probative value. Yet this evidence formed the basis for a substantial deprivation of Constitutionally protected property rights. The

zoning action was a parcel by parcel "dispensation" of use, density and other development rights and burdens. The very abuse feared by Justice Stevens occurred here.*

The long line of cases before this Court dealing with the *substantive* limits of the police power have established that it is "one of the most essential powers of government, – one that is the least limitable." *Hadacheck v. Sebastian,* 239 U.S. 394, 410, 60 L.Ed. 348, 356 (1915). Justice Stevens, who spoke so forcefully in favor of providing appropriate procedural due process in zoning proceedings, has also stated, in regard to the substantive freedom enjoyed by zoning bodies exercising the police power:

> "It is not our function to appraise the wisdom of its [the Common Council of the City of Detroit] decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 71, 49 L.Ed.2d 310, 326-27 (1976).

***True, Justice Stevens is speaking of an application by an individual property owner for single parcel upzoning, and the proceeding here involved several parcels, treated collectively. But that is not a significant distinction, particularly because this case involves a downzoning, a diminishing of property rights. Justice Stevens also recognized:**

> **"When we examine a state procedure for the purpose of deciding whether it comports with the constitutional standard of due process, the fact that a State may give it a 'legislative' label should not save an otherwise invalid procedure." 426 U.S. at 686, 49 L.E.2d at 145.**

When such vast discretion is permitted in substantive areas, then procedural constraints are all the more important. As a minimum, procedural due process demands procedures which will assure development of competent, reliable, probative evidence to justify zoning action which diminishes substantive rights. Procedures which permit such zoning action to rest upon incompetent, unreliable, untested evidence are Constitutionally inadequate. The greater the impact upon substantive rights, the greater is the necessity for procedural protection to prevent an arbitrary exercise of the police power.

It is perhaps surprising that the formulation of standards of *procedural* due process have lagged behind the formulation of standards of *substantive* due process in zoning. Justice Douglas stated in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 179, 95 L.Ed. 817, 858 (1951):

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."

Justice White, in his dissenting Opinion in *Moore v. City of East Cleveland*, ____ U.S. ____, 52 L.Ed.2d 531, 563 (1977), recognized that historically the first purpose of the Due Process Clauses has been the affordance of "procedural due process." He stated:

> "The emphasis of the Due Process Clause is on '*process.*' As Mr. Justice Harlan once observed, it has been 'ably and consistently argued in response

> to what were felt to be abuses by this Court of its reviewing power. . . .' that the Due Process Clause should be limited 'to a guarantee of procedural due process.' *Poe v. Ullman*, 367 U.S. 497, 540, 6 L.Ed.2d 989, 81 S. Ct. 1752 (1961) (Harlan, J., dissenting)."

Petitioners are seeking this fundamental procedural protection which the Constitution affords, at a time when procedural protection is becoming the last safeguard of property owners' rights.

If procedural due process must be afforded, the question follows, What does that include, and in particular, does it include a right of cross-examination? The answer centers upon the fundamental role of cross-examination in the development of a proper evidentiary support for governmental action.

The zoning action here (the implementation of a Sector Plan by sectional map amendment) is not jurisdiction-wide comprehensive rezoning. The County Council itself held it to be implementation of a "detailed development plan" on a parcel by parcel basis. The Circuit Court recognized the particular character of this zoning action:

> "The court [Circuit Court] ultimately narrowed its holding; it said that cross-examination need not be extended to the parties in all comprehensive rezoning hearings but '*where comprehensive rezoning is effected by a sectional map amendment which adopts a sector plan and consequently rezones property within a CBD, the District Council must afford to the parties, upon request, a reasonable opportunity for cross-examination.*'" Opinion Below, 376 A.2d at 496 (emphasis added).

The distinction between zoning of an individual parcel and the zoning involved here is only one of numbers. Petitioners have not lost any procedural due process protection which they might otherwise have had merely because the zoning body decided to consider their property collectively with that of others. This case, therefore, is not one which lies at the far end of the spectrum with jurisdiction-wide comprehensive zoning. Rather, because of the particularized allocation of development rights involved, on a parcel by parcel basis, the downzoning here is closer to single lot zoning.

In other types of cases, this Court has addressed the importance of the opportunity to cross-examine witnesses whose testimony might be the basis for depriving one of Constitutionally protected rights. In *Greene v. McElroy*, 360 U.S. 474, 496-97, 3 L.Ed.2d 1377, 1390-91 (1959) Chief Justice Warren, speaking for five members of the Court, said:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth

Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. *It has spoken out not only in criminal cases,* [citations omitted], *but also in all types of cases where administrative and regulatory actions were under scrutiny.* [Citations omitted.] Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168, 169, 95 L.Ed. 817, 852, 71 S. Ct. 624 (concurring opinion).

"Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) §1367:

> 'For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. *The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.*'" (Emphasis added.)

The opportunity to introduce evidence and rebuttal evidence before the County Council did not fulfill the need to discredit and impeach opposing witnesses. It is not enough to have a record, for example, where one witness has stated that permitting large buildings *will not* result in harmful traffic or air pollution, and has given his reasons, and an opposing witness has stated

that permitting large buildings *will* result in harmful traffic and air pollution, and has given his reasons. Neither party has had an opportunity to discredit or impeach the other, and faced with such a record, the decision-maker could make any decision and find a basis for it. The incompetent, unreliable evidence has not been separated from that which is competent, reliable, and probative. This produces the incongruous result that while a record devoid of evidence cannot support a decision, false, untested evidence in a record could.

Some evidence may on its face carry more weight than other evidence. However, the accepted method for determining the weight of the evidence is not on the basis of its *prima facie* value. Rather, it is to test that evidence by cross-examination. Only after evidence is so tested will the decision-maker be in a position to apply the substantive criteria enunciated by this Court in *Euclid v. Ambler Realty, supra,* and succeeding cases. The decision will have the proper evidentiary support. Property rights at stake will be afforded their guaranteed *procedural* due process protection, as well as their guaranteed *substantive* due process protection.

The practical consideration that an inordinant amount of time, effort, and expense would be required to conduct a due process, trial-type hearing with cross-examination where a number of property owners are involved has often been raised in this case. The Circuit Court Judge addressed this problem in his Opinion striking the downzoning action. He stated:

> "[T]he Court does not envision the problems predicted by the appellees [Montgomery County, *et al.*], with massive numbers of people asking the opportunity to interrogate one another. The Council cannot be heard to complain in this regard as it was their determination to consider a large number of properties in one proceeding. Similar problems have been solved in local map amendment cases by referring the matter to a hearing examiner." Opinion of the Circuit Court at 32 (App. 110a).

Petitioners' procedural due process rights should not be lost because their property has been considered collectively with that of others. The statement of Mr. Justice Holmes in *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393, 416, 67 L.Ed. 322, 326 (1922), is appropriate here:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

The fact that procedural safeguards may be cumbersome in some respects does not eliminate the Constitutional requirement that they be afforded.

CONCLUSION

The exercise of the police power to downzone property is circumscribed by Constitutional standards of substantive and procedural due process. This Court has spoken many times on the substantive limitations upon the exercise of the police power in zoning proceedings. It has never addressed the question, What Constitutional standard of procedural due process is applicable in a downzoning proceeding? This case presents that question squarely. The question is more crucial now than ever before, when governmental action affects so many substantive rights. Procedural safeguards have become the most important protection against arbitrary governmental action. Consequently, the question presented is appropriate for consideration by this Court and the Writ should be issued.

Respectfully submitted,

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[483]

APPENDIX A

MONTGOMERY COUNTY, Maryland, et al.

v.

WOODWARD & LOTHROP, INC., et al.

No. 104.

Court of Appeals of Maryland.

July 15, 1977.

* * *

[485] **Richard E. Frederick, Asst. County Atty., Rockville (Richard S. McKernon, County Atty., Rockville, on the brief), for Montgomery County, Maryland.**

Roger W. Titus, Rockville, for Citizens Coordinating Committee on Friendship Heights, Inc. et al.

William S. Green, Washington, D.C. (Pierson, Ball & Dowd and Richard M. Singer, Washington, D.C., on the brief), for Sp. Taxing Dist. of Friendship Heights and the Hills and the Friendship Heights Village Council.

Norman M. Glasgow, Washington, D.C. (John F. McCabe, Jr., Washington, D.C., on the brief), for Morton Funger et al.

Stephen Z. Kaufman, Silver Spring (Joseph P. Blocher, Silver Spring, on the brief), for Sidney S. Zlotnick et al., Homer S. Gudelsky, Trustee and The Marina Apartments, Inc.

[486] David N. Webster, Washington, D.C. (Paul R. Connolly, Washington, D.C., on the brief), for Milton A. Barlow et al.

Howard J. Thomas, Silver Spring, Charles R. Donnenfeld, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., on brief, for Woodward & Lothrop, Inc. et al.

George H. Beuchert, Jr., Washington, D.C., on brief, for The Chevy Chase Land Co. of Montgomery County, Md.

William M. Canby, Rockville, on brief, for Gevco Company, Inc. et al.

Prince George's County, Maryland by James C. Chapin, County Atty., Michael O. Connaughton, Deputy County Atty., and Steven M. Gilbert, Assoc. County Atty., Upper Marlboro, on the brief, for amicus curiae.

Argued before MURPHY, C. J., and SINGLEY, SMITH, DIGGES, LEVINE and ORTH, JJ.

MURPHY, Chief Judge.

These appeals draw into question the validity of a rezoning by sectional map amendment of all properties within the Central Business District of Friendship Heights, Montgomery County, Maryland.

The Regional District Act, Maryland Code (1957, 1976 Cum.Supp.) Art. 66D, § 8–101(b) grants zoning power to the Montgomery County Council, sitting as a District Council (the Council) for that portion of the Maryland-Washington Regional District lying within the county, to regulate by ordi-

nance, *inter alia* (1) the location, height, bulk, and size of buildings, (2) the size of lots and other open spaces, (3) the density and distribution of population, and (4) the location and uses of buildings and land.[1] In the exercise of this power, the Council is authorized to divide the Regional District within the county "into districts and zones of whatever number, shape or area it may determine." Art. 66D, § 8–102. The zoning powers vested in the Council have been implemented by enactment of the Montgomery County zoning ordinance (the zoning ordinance), Montgomery County Code (1972), ch. 59, §§ 59–1 through 59–209. In addition to the text provisions of the zoning ordinance, the adopted zoning map for that portion of the Regional District located in Montgomery County is expressly made a part of the ordinance by § 59–38. Section 59–205 authorizes amendments to the text of the zoning ordinance. Section 59–195 authorizes amendments to the zoning map; it provides that an application for amend-

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1. The Regional District encompasses, with minor exceptions, all land in Prince George's and Montgomery Counties. *See New Carrollton v. Belsinger Signs*, 266 Md. 229, 292 A.2d 648 (1972).

ment of the zoning map may be in the form of:

> "(a) A local [piecemeal] amendment covering a single tract, all portions of which are proposed to be classified in the same zone; or all portions of which are proposed to be classified in one of two alternative zones.
>
> "(b) A sectional plan amendment covering a section of the Maryland-Washington Regional District, portions of which may be proposed to be classified in different zones.
>
> "(c) A district plan amendment covering the entire Maryland-Washington Regional District within the county."

Section 59–196 provides that proposals for a sectional or district plan map amendment may be made only by the Maryland-National Capital Park and Planning Commission (the Planning Commission) or by the Council.

(1)

The Central Business District (CBD) of Friendship Heights is one of five such districts in Montgomery County authorized by § 59–50(b)(1) of the Montgomery County Code (1972). It encompasses the entire po-

litical subdivision known as the Special Taxing Districts of Friendship Heights and The Hills.[2] Located on the boundary line between the county and the District of Co-
[487] lumbia, it is bordered by Wisconsin and Western Avenues and lies generally north of the District of Columbia, west of the Village of Chevy Chase, and south of the Town of Somerset. The Friendship Heights CBD is compact and intensely developed; within its borders is a mixture of residential, office, and commercial development consisting of a number of high-rise, high-density apartment houses and hotels, office buildings, retail shopping centers, including several department stores, and some single family residences. It has been aptly described as an urban crossroad, a business center both local and regional in scope, with buildings of "Manhattan-like" proportions. It is a major transportation center in the county and a rapid rail (Metro) transit station is scheduled for construction at the intersection of Wisconsin and Western Avenues by late 1980. The Friendship Heights CBD is virtually sur-

2. Montgomery County Code (1972), ch. 66, § 66–1. *See also Friendship Heights v. Funger*, 265 Md. 339, 289 A.2d 329 (1972).

rounded by single family residential neighborhoods located immediately outside of its eastern, western and northern boundaries. Population in 1972 within the CBD was almost 3,000 persons. Prior to May 28, 1974, the Friendship Heights CBD was comprised of a land area totalling 62 acres. Existing zoning within the CBD at that time was primarily high density commercial, C–2 (General commercial), with some R–CBD (Multi-family, residential). No floor area ratio (FAR) limits were imposed by this zoning, which allowed a maximum height of 110 feet with provision for additional floors, upon compliance with certain conditions, up to 143 feet.

On May 28, 1974, the Council amended the text of § 59–50(b)(1) of the zoning ordinance by reducing the size of the Friendship Heights CBD to 37.51 acres and realigning its boundaries. Thereafter, on July 16, 1974, the Council adopted Resolution 7–1849 granting Sectional Map Amendment Application F–947 to the zoning ordinance, which implemented an adopted "Sector Plan" for the Friendship Heights CBD. The sectional map amendment rezoned a total of 41.01 acres of land, comprising all property within the revised CBD and a 3.50-

acre parcel of land immediately outside its boundaries. It assigned new zoning classifications to all properties within the CBD which regulated the height, area and use of permissible development and thereby sharply reduced the densities and floor areas that could be built.

Ten aggrieved property owners whose properties had been downzoned by the sectional map amendment appealed to the Circuit Court for Montgomery County, as authorized by Maryland Code, Art. 66D, § 8–105. The issues being similar, the cases were consolidated for hearing and oral argument extended over a four-day period. On July 15, 1976, Judge H. Ralph Miller, in a thorough and studious memorandum opinion and order, reversed the Council's resolution granting the sectional map amendment on the ground that the procedural rights of the property owners to cross-examine witnesses at the sectional map amendment hearings before the Council, and to be afforded sufficient time to present evidence at those hearings, had been violated. Appeals were filed from this judgment to the Court of Special Appeals by Montgomery County, the Citizens Coordinating Committee of Friendship Heights, the Special Taxing Districts of Friendship Heights and The Hills, and the Friendship Heights Village Council, all parties to the proceedings below (hereinafter the appellants). The property owners (hereinafter the appellees) filed cross-appeals, contending that the lower court erred in concluding (1) that the sectional map amendment constituted comprehensive, rather than local or piecemeal, rezoning; (2) that the Council and the Planning Commission had acted within their statutory authority in adopting the Sector Plan for the Friendship Heights CBD upon which the sectional map amendment was based; and (3) that the sectional map amendment did not constitute either conditional zoning, a "confiscation" of property, or a violation of the uniformity requirements of the zoning ordinance. We granted certiorari prior to decision in the cases by the Court of Special Appeals. *See* Maryland Code (1974) Courts and Judicial Proceedings Article § 12–201.

[488]

(2)

The appeals have spawned a massive 12-volume record extract totalling almost 5,000 pages. Briefs filed by the parties collec-

tively exceed 365 pages. A review of matters underlying adoption of the Sector Plan for the Friendship Heights CBD, upon which the sectional map amendment is based, is essential to a proper understanding of the issues raised by the parties.

Maryland Code, Art. 66D, § 7–108 authorizes the Planning Commission, with the approval of the Montgomery County Council, to adopt both a General Plan for the physical development of the Regional District and a local Master Plan for each planning area in the county. Pursuant to this authority, a General Plan was adopted on January 22, 1964 for Montgomery and Prince George's Counties entitled "On Wedges and Corridors." It called for high density urban development along major transportation corridors in Montgomery County and preservation of the areas between the corridors (the wedge area) for low density development, buffers, parks and recreational areas. It envisioned the creation of five central business districts in Montgomery County, one to be located in Friendship Heights—the urbanized base of the northwest corridor in the county. The General Plan recognized that existing commercial zones were inadequate, particularly

for complex business centers and it warned against too intensive development within urban areas. It noted that the presence or absence of utilities can determine where urban growth will occur and observed that excessive development could aggravate strained street systems and water and sewerage resources. The General Plan characterized itself as a "dynamic instrument rather than a finished product"; it stated that while its goals and major patterns were firm, "its details must evolve and develop." It called for the development of local area plans in Montgomery County, noting that such plans "will be of utmost importance in preparing sectional zoning map amendments which will form the basis for properly controlling the sequence of development, as well as for solving local land use, transportation and public service problems." It also noted a need for "specific project plans" to deal with "[s]pecific small-scale problems . . . such as revitalizing a business district . . . [which will] require very detailed project planning."

In conformity with the recommendation of the General Plan, a local Master Plan for the 22-square-mile Bethesda-Chevy Chase

Planning Area (the B–CC Master Plan), of which Friendship Heights was a part, was adopted in 1970. It projected considerable growth for Friendship Heights, both in the Maryland and District of Columbia portions, and indicated that such growth would likely intensify with the anticipated opening of a rapid rail (Metro) transit station in Friendship Heights. The B–CC Master Plan recommended that allowance be made for the orderly expansion of the Friendship Heights CBD, consistent with the need for open space; that parking requirements be diminished in the CBD; and that surrounding single family residential neighborhoods be protected. It also called for more detailed study of proposed land use and facilities within the CBD, and recommended that a "detailed development plan" be prepared for the entire Friendship Heights area, including both the Maryland and District of Columbia portions. Finally, it called for the creation of new commercial zones to assure the adequate development of CBDs in the county.

On June 22, 1971, the Montgomery County Council enacted Resolution 7–270 creating a Citizens Advisory Committee (the Blue Ribbon Committee) "To Study Zoning

In Central Business Districts And Transit Station Areas" throughout the county. The resolution recited that "patterns of development are changing in high density areas of the county and in areas which will be affected by the advent of a rapid rail system"; the resolution expressed a need to develop new zones and revise existing zones in order to encourage the development of mixed use and relatively high density centers of residential, commercial and office activities in the CBDs while at the same
[489] time protecting existing residential neighborhoods from the impact of such development. Shortly after the creation of the Blue Ribbon Committee, the Planning Commission appointed an Advisory Committee for the specific purpose of assisting it in preparing a detailed development plan for Friendship Heights as recommended by the 1970 B–CC Master Plan.

The Blue Ribbon Committee recommended to the Council that three new and more restrictive zoning categories be adopted for CBDs in the county—CBD–1, CBD–2, and CBD–3, each containing a standard and optional method of development. The Committee recommended that these zones replace all others then authorized within

the CBD, and that detailed, short-range (6-to-10-year) plans, to be known as "Sector Plans," be adopted as amendments to the applicable Master Plans for CBDs in each planning district in the county.[3]

The Planning Commission, with the assistance of the Advisory Committee, prepared a "Preliminary Sector Plan for the Central Business District of Friendship Heights" in December of 1972. Centered on the proposed Friendship Heights rapid

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3. In its report, the Committee recommended, and the Council adopted, an amendment to the zoning ordinance, which defined the term "Sector Plan" as follows:

> "Comprehensive plan for a portion of a master plan area, showing in detail such planning features as type, density and intensity of land uses, pedestrian traffic features, public facilities (parking structures, public open space, rapid transit station, community service provisions and the like), and relationship of the various uses planned to transportation, services and amenities within the area of the sector plan and, where appropriate, to other areas. The sector plan may include maps, graphics and text, and is designed as the sector plan for the area which it encompasses. It may be adopted either as a part of a new area master plan or as an amendment to an existing master plan." *See* County Code (1972, 1975 Cum.Supp.) § 59–1.

transit station, it encompassed the entire geographic area of the CBD, and included the "immediate environs" of Friendship Heights, a total of approximately 78 acres; it also took into consideration matters relating to the Town of Somerset and Chevy Chase Village, adjacent to the CBD. The Preliminary Sector Plan purported to be an amendment to the B–CC Master Plan, refining and implementing the policy objectives outlined in that plan, viz., (1) to provide for the orderly development of the CBD "at a scale which can be tolerably balanced against the constraints imposed by a seriously limited feeder road system," (2) to utilize new zoning tools to accomplish that end, (3) to preserve and protect the residential neighborhoods adjacent to the CBD, and (4) to undertake public improvement programs and enact zoning changes required to support the proposed planning objectives. The Preliminary Sector Plan stated that the amount of development within the CBD must be related to the ability of the existing feeder road system to serve the CBD; it noted, however, that these roads could not be significantly improved except at unacceptable financial and environmental costs. It concluded that

traffic on feeder roads was a primary constraint on the amount of development that was feasible in Friendship Heights. It said that if development within the CBD were to occur at the scale and intensity permitted by existing zoning the feeder road system would become impacted to an intolerable degree. The Preliminary Sector Plan also referred to environmental and other constraints upon development within the CBD. It, therefore, recommended a substantial reduction in the amount and intensity of development within the CBD, adoption of the more restrictive CBD zoning categories recommended by the Blue Ribbon Committee, and a reduction in the size of the CBD itself.

Public hearings were held on the preliminary Sector Plan before the Montgomery County Planning Board (the Planning Board) of the Planning Commission for five days in February and March of 1973. Almost 100 witnesses appeared and a transcript of over 1,300 pages was assembled, together with a large amount of documentary material.

[490] On September 4, 1973, the Council adopted the new and more restrictive CBD zones

(standard and optional method of development) recommended by the Blue Ribbon Committee.[4] Thereafter, in October of 1973, the Planning Board, having studied the record made at the public hearings on the Preliminary Sector Plan, adopted a Final Draft Sector Plan, which it transmitted to the Council. Public hearings were held by the Council over a three-day period in February of 1974 on the proposal to adopt the Plan, together with a proposed text amendment to § 59–50(b)(1) of the zoning ordinance to reduce the size and realign the boundaries of the Friendship Heights CBD. A total of 76 witnesses appeared at these hearings and a transcript of over 550 pages was amassed. Numerous written documents were received into the record, as well as the entire record of the five public hearings held on the Preliminary Sector Plan.

At the public hearings before the Planning Board and the Council on the Preliminary and Final Draft Sector Plans, considerable evidence, both testimonial and documentary, was adduced relating to traf-

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4. Montgomery County Code (1972, 1975 Cum. Supp.), ch. 59, §§ 59–51.3, .4, and .5; §§ 59–31.2 and .3 (optional method of development).

fic constraints upon development within the Friendship Heights area. There was testimony that the amount of traffic generated by various existing developments in Friendship Heights caused hopeless congestion of the feeder road system. There was also contrary testimony that the feeder road system was not congested and could accommodate higher amounts of traffic. There was evidence relating to a severe air pollution problem in Friendship Heights, generated in part by automobile exhaust pollutants from the high volume automobile traffic. There was evidence that the sewerage system serving Friendship Heights was operating in excess of safe capacity and as a consequence raw sewage was being discharged into the Potomac River. There was evidence that there was almost a total lack of open space or green area within the CBD and that the scale and intensity of development in such a small area caused traffic congestion, inadequate parking, aggravating noise, and visual pollution.

The Council held five work sessions in early 1974 on the Final Draft Sector Plan, approving it, with modifications, together with the text amendment to § 59–50(b)(1)

of the zoning ordinance, on May 28, 1974.[5] In adopting the Sector Plan (the Adopted Sector Plan), the Council accepted the recommendations made in the Preliminary Sector Plan as to the existence and effect of traffic and environmental constraints on the amount of development which was feasible within the Friendship Heights CBD. With respect to traffic constraints upon development in Friendship Heights, the Adopted Sector Plan determined that Metro would serve Friendship Heights by late 1980 and that under the minimum acceptable traffic constraints at peak hours (so-called service level D), there would be a maximum of approximately 11,000 development-induced trips (evening peak hour vehicular trips originating in or destined to both the District of Columbia and Maryland portions of Friendship Heights) over and above through traffic trips and those trips to and from the proposed Metro station.

To implement the zoning recommendations contained in the Adopted Sector Plan, Sectional Map Amendment Application F–947 was filed on June 4, 1974 and a public

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5. The Planning Commission adopted the approved Sector Plan on June 12, 1974.

hearing was scheduled for July 8 and 13, 1974. The Council advised all property owners within the CBD a week prior to the hearing that time limitations would be imposed for the presentation of oral testimony—eight minutes for property owners, six minutes for the Special Taxing Districts, and less for civic associations and individuals. The Council also announced that it would not allow cross-examination of speakers, although it would at the conclusion of all testimony provide time for rebuttal by any previous speaker wishing to challenge or correct prior statements or material. Timely objection to this procedure was
[491] made by the appellees. Twenty-five witnesses testified at these hearings and the entire record of the public hearings on the Preliminary and Final Draft Sector Plan was made a part of the record. After holding a final work session, the Council adopted Resolution No. 7–1849 on July 16, 1974, granting the sectional map amendment.

As required by § 59–208 of the County Code (1972), the Council filed an opinion "setting forth its conclusions and reasons" for granting the sectional map amendment. After noting that the map amendment was filed to implement the Adopted Sector Plan,

and that that Plan was the detailed development plan for the Friendship Heights CBD recommended by the B–CC Master Plan, the Council said:

> "In the February 27, 1974 worksession, the County Council, after a careful study of the voluminous evidence, accepted the traffic capacity figures and trip generation rates as a basis for proceeding on the Sector Plan; i. e., an overall modal split of 20%,[6] generation factors of · 1.5 trips/1,000 square feet of office space, 3.6 trips/1,000 square feet of retail space, and 0.7 trips/residential dwelling unit, and the traffic capacity limitation of 11,000 p. m. peak hour development-induced trips. The County Council found the above-mentioned figures reasonable with regard to the use and traffic capacity for the subject area and that there is substantial technical and experimental bases for the estimation that there should be 11,000 locally generated peak hour trips.

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6. A 20% modal split, in traffic planning parlance, means that 20% of all trips being made to, from, and through Friendship Heights will be by modes of transportation other than automobile, with 80% of the trips being by automobile.

"The County Council in dealing with the issues of density and land use found it appropriate to analyze land use questions as they relate to both density and use, and then to translate them into considerations dealing with the recommended land use designations. The Council, in applying the new CBD zones to certain parcels in the study area, examined the question of the development limits that would be applicable within the Friendship Heights Central Business District. The Council has concluded that, given the traffic capacity figures and trip generation rates, the land use designations which appear in the adopted and approved Friendship Heights Sector Plan will allow development to occur that will not overload the existing transportation system and other public facilities.

"The Council in limiting the number of new trips to be generated in Friendship Heights has recognized that the air quality of the area should be preserved at pollutant levels below federal and state air quality ceilings. Although future regulation concerning air quality may preclude some development, it was concluded that the constraints placed upon

traffic will result in the stabilization of the air quality in the Friendship Heights area.

"In designating CBD zones to areas within the Friendship Heights Central Business District, the Council has recognized that the CBD zones were designated to assure that future development will provide more green space, setbacks, and human amenities than have characterized Friendship Heights development in the past. The existing development within the Friendship Heights Sector Plan Area comprises 1,028,000 square feet of office use, 437,000 square feet of retail use, 230 motel units, and 2,999 residential dwelling units. These uses include several large office buildings, several department stores including Woodward and Lothrop and Sak's Fifth Avenue, and a number of apartment and condominium buildings. In order to assure that the scale of development in the future will result in a quality of life that would be appropriate for areas such as Friendship Heights, the approved and adopted Sector Plan allows for an additional 555,000 square feet of office use, 375,000 square feet of retail use, 1,648 residential dwelling units, and

a projected total population in the Sector Plan Area of 6,000 persons.

[492] "The County Council further recognized that the Friendship Heights Sector Plan Area is surrounded by a single family residential areas and that these neighborhoods must be protected and buffered from the development occurring in the central business district. In approving the Sector Plan for the Friendship Heights Central Business District, the County Council felt that the land uses designated in the Sector Plan would not adversely impact the lifestyles and quality of life found in the nearby neighborhoods and yet would provide those person desiring a more urbanized setting the opportunity to live in an area such as the Friendship Heights Central Business District."

* * * * * *

". . . The County Council finds from this evidence [of record] that it would be in the public interest, and serve to protect the public health, safety and welfare that Sectional Plan Amendment F–947 should be granted."

(3)

In reversing the Council's resolution granting the sectional map amendment, the lower court held that the Council's refusal to permit cross-examination at the sectional map amendment hearings, or to afford property owners sufficient time to present evidence, violated §§ 59–204 and 59–207 of the County Code, as construed in *Hyson v. Montgomery County*, 242 Md. 55, 217 A.2d 578 (1966), without regard to whether the rezoning was local (piecemeal) or comprehensive.

Appellants contend that the principles enunciated in *Hyson* relating to the right of cross-examination apply only to local map amendment hearings involving a piecemeal rezoning and not to a sectional map amendment proceeding filed by the Council which effectuates a comprehensive rezoning. They also argue that the lower court was in error in holding that the appellees were not afforded adequate time to present evidence at the sectional map amendment hearings before the Council. They maintain that since the lower court found that the rezoning was comprehensive and otherwise lawful, its action in reversing the Council's

resolution was improper. The appellees claim that Judge Miller correctly held that they were denied their right of cross-examination and sufficient time to submit evidence into the record at the sectional map amendment hearings. They contend that Judge Miller was also correct in holding that §§ 59–204 and 59–207 of the County Code, as construed in *Hyson*, applied to comprehensive as well as piecemeal rezoning. They argue, however, that he was wrong in concluding that the rezoning in this case was comprehensive. Whether the rezoning was comprehensive and valid is thus a threshold issue in the case to which we initially turn our attention.

(4)

The parties agree that under our cases,[7] so succinctly synthesized by the Court of

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7. *Nottingham Village v. Baltimore County*, 266 Md. 339, 354–55, 292 A.2d 680, 688 (1972); *Scull v. Coleman*, 251 Md. 6, 10–11, 246 A.2d 223, 225 (1968); *Trustees v. Baltimore County*, 221 Md. 550, 561, 158 A.2d 637, 642 (1960); *Hewitt v. Baltimore County*, 220 Md. 48, 151 A.2d 144 (1959); *Huff v. Bd. of Zoning Appeals*, 214 Md. 48, 133 A.2d 83 (1957); *Anne Arundel County v. Ward*, 186 Md. 330, 46 A.2d 684 (1946).

Special Appeals in *Grooms v. LaVale Zoning Board*, 27 Md.App. 266, 277, 340 A.2d 385 (1975), a comprehensive zoning plan is one which applies to or covers a substantial or wide geographical area. The zoning plan must be well thought out, the product of careful consideration and extensive study, and based upon considerations concerning the common needs of the particular area. It must be designed to control and direct the use of land and buildings according to present and planned future conditions, to accomplish as far as possible the most appropriate uses of land consistent with the public interest and the safeguarding of the interests of the individual property owners. Other characteristics of comprehensiveness may be found in the fact that the plan zones all, or substantially all, of a political
[493] subdivision, that it regulates all uses, or that it covers all of the usual factors of land utilization: height, area and use.

Appellees contend that to constitute valid comprehensive rezoning, the proposed changes must be related to land use planning and overall zoning policies for an entire planning area, here the 22-square-mile B–CC planning area of which Friendship Heights is but a small part. They contend

that zoning through sectional map amendment in Montgomery County has always been based exclusively upon an approved General Plan or local Master Plan, but that the Adopted Sector Plan for the Friendship Heights CBD, and the sectional map amendment which implements it, represent a drastic departure from the recommendations of these basic planning documents, both of which call for intensification of development and expansion of the Friendship Heights area. Appellees claim that because the Adopted Sector Plan has no comprehensive land use planning basis, it cannot constitute a valid amendment to the General Plan or the B–CC Master Plan. It is nothing more, they say, than a detailed study of individual parcels of land within the CBD considered in isolation from the relevant planning area and consequently the sectional map amendment in reality is but a parcel-by-parcel local piecemeal rezoning which must be judged by the "change-mistake" rule.[8]

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8. Under the "change-mistake" rule, to sustain a piecemeal zoning change, there must be produced strong evidence of mistake in the original zoning or else evidence of a change in

[footnote continued]

[1] We think the Adopted Sector Plan, upon which the sectional map amendment was based, plainly constitutes the detailed development plan for the Friendship Heights CBD called for by the B–CC Master Plan, the need for which was also recognized in the General Plan. We view the Adopted Sector Plan as a valid amendment to these planning documents and therefore find no merit in the suggestion that because the Adopted Sector Plan does not include the entire B–CC planning area, the sectional map amendment lacks a comprehensive land use planning basis. There is no requirement that the area covered by a sectional map amendment coincide with the area of the relevant Master Plan; it need only apply to a "section of the Maryland-Washington Regional District" (§ 59–195 of the zoning ordinance). Nor is there any requirement, absent a statute, that the map

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conditions resulting in a substantial change in the character of the neighborhood. *Rockville v. Henley*, 268 Md. 469, 302 A.2d 45 (1973); *Clayman v. Prince George's County*, 266 Md. 409, 292 A.2d 689 (1972); *Heller v. Prince George's County*, 264 Md. 410, 286 A.2d 772 (1972). The rule has no application in comprehensive rezoning cases. *Scull v. Coleman*, *supra*.

amendment must adhere to the recommendations of the General or Master Plan. Such land use planning documents represent only a basic scheme generally outlining planning and zoning objectives in an extensive area, and are in no sense a final plan; they are continually subject to modification in the light of actual land use development and serve as a guide rather than a strait jacket. *Nottingham Village v. Balto. County, supra*, 266 Md. at 354, 292 A.2d 680. *See also Pattey v. Board of County Comm'rs*, 271 Md. 352, 317 A.2d 142 (1974); *Iverson v. Zoning Board*, 22 Md.App. 265, 322 A.2d 569 (1974). Moreover, contrary to appellees' suggestion, the Adopted Sector Plan is by no means fundamentally inconsistent with either the General Plan or the B–CC Master Plan; it represented but a specific modification of the planning and zoning objectives broadly outlined in those documents based on existing land use facts.

[2] While the Adopted Sector Plan was limited to a study of a 78-acre planning area and its immediate environs, and did not cover a wide geographical area in the county, we think the 41-acre area rezoned by the sectional map amendment does com-

prise, in the particular circumstances of this case, a "substantial" area for purposes of determining whether the rezoning was comprehensive. What is a "substantial" area in this context cannot be measured solely in terms of the acreage covered by the zoning plan, but rather may take into account the
[494] substantiality of existing and proposed land use within the area, the fact that the area rezoned embraces an entire political subdivision, population, intensity of development, and whether the plan purports to address the common needs of a particular district. *Nottingham Village v. Baltimore County, supra; Scull v. Coleman, supra; Anne Arundel County v. Ward, supra.*[9] In other

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9. *Anne Arundel County v. Ward, supra*, involved an original zoning. Our predecessors there held that the requirement for comprehensiveness was met "if due consideration is given to the common needs of a particular district." 186 Md. at 340, 46 A.2d at 688. In his oft-cited article in 68 Harv.L.Rev. 1154, 1161 (1955) entitled "*In accordance with a Comprehensive Plan*," Professor Charles M. Haar expressed the view that under the holding of the *Ward* case, "a governmental unit could select any relatively small segment of its land for regulation, so long as that regulation was coherent and rationally supportable in reference to the district involved."

words, the test of a "substantial" area for purposes of comprehensive zoning is a flexible one and depends on the circumstances. In *Border v. Grooms*, 267 Md. 100, 109, 297 A.2d 81, 85 (1972), a piecemeal zoning case involving a determination of whether there had been a change in the "neighborhood," we recognized that "the concept of a neighborhood is a flexible one and will vary according to the geographical location involved, it being axiomatic that in a rural or semi-rural area the 'neighborhood' will be larger and more fluid than in a city or suburban area." By analogy, the rationale of that case is applicable here in regard to our determination of whether a sectional map amendment, which purports to be a comprehensive rezoning, applies to or covers a "substantial" geographical area.

As previously indicated, the Friendship Heights CBD is one of five such districts in Montgomery County, encompassing within its well-defined borders an intensely developed political subdivision with a population projected to increase to 6,000 persons under the development plan outlined in the Adopted Sector Plan. Although a rezoning of 41 acres in a rural setting would not likely be considered "substantial," the rezoning of that amount of land in Friendship

Heights by sectional map amendment which regulates all uses of properties within the CBD indeed covers a "substantial" area within the contemplation of our cases. We therefore agree with the lower court that the geographic requirement for comprehensive rezoning has been satisfied.

All other requisite indicia of comprehensiveness are also present. Underlying adoption of the sectional map amendment was a well thought out, carefully considered and extensively studied (for over three years) plan, correlated to the common needs of the Friendship Heights are. There was massive participation in the planning process by property owners, citizens, governmental officials, developers, expert witnesses, and civic and community associations. The plan took into account, as a primary constraint, severe limitations on the street system, and also inadequacies of sewerage transmission and disposal, the effects of air pollution and other environmental constraints. As heretofore indicated, the requirement for a comprehensive plan is met "if due consideration is given to the common needs of a particular district," *Anne Arundel County v. Ward, supra*, 186 Md. at

340, 46 A.2d at 688, and we think the sectional map amendment in this case plainly meets that criterion.

[3, 4] We think the record in this case fully supports the lower court's holding that the rezoning was designed to control and direct the use of land and buildings according to present and planned future conditions, so as to accomplish the most appropriate uses of land, consistent with the public interest and the safeguarding of the interests of the individual property owners. No useful purpose would be served by a detailed or extended discussion of the volumes of evidence before the Council relating to traffic and environmental constraints upon the scale of permissible development in the Friendship Heights area. Suffice it to say that the record convincingly demonstrates that the rezoning was comprehensive and bore a substantial relationship to the public
[495] health, comfort, safety, convenience, morals and general welfare; as such it enjoys a strong presumption of validity. *See County Council v. District Land*, 274 Md. 691, 337 A.2d 712 (1975); *Montgomery County Council v. Leizman*, 268 Md. 621, 303 A.2d

374 (1973); *Norbeck v. Montgomery County*, 254 Md. 59, 254 A.2d 700 (1969). Zoning is, of course, a legislative function and our review of the acts of the zoning authority is restricted and narrow in scope. We decide only whether the zoning action was arbitrary, discriminatory or illegal; we do not substitute our judgment for that of the zoning authority if its decision is supported by substantial evidence and the issue is fairly debatable. *Ark Readi-Mix v. Smith*, 251 Md. 1, 246 A.2d 220 (1968); *Trustees v. Baltimore County, supra*. Appellees have not overcome the presumption that the rezoning was valid and bore the necessary relationship to the general public interest and welfare.

In concluding that the sectional map amendment constituted comprehensive rezoning, we note the presence of other cardinal characteristics of comprehensiveness, *i. e.*, all property within the CBD was rezoned by regulating all uses and covering all of the usual factors of land utilization—height, area and use. In addition, the area rezoned encompassed an entire political subdivision of the county.

[5, 6] The record does not support appellees' suggestion that the rezoning constituted a political decision to satisfy some property owners at the expense of others. Nor is it necessary to show by specific evidence, as appellees argue, that the rezoning benefits all of the citizens of the county. *Norbeck v. Montgomery County, supra; Anne Arundel County v. Ward, supra.* Finally, appellees' argument that the rezoning was not comprehensive because only 24 of the 41 acres affected were actually downzoned is equally without merit. That few changes may have been made in a comprehensive rezoning plan does not change its character or alter its nature. *See Scull v. Coleman, supra,* 251 Md. at 11–12, 246 A.2d 223.

(5)

We think the lower court was wrong in holding that even though the rezoning was comprehensive, *Hyson v. Montgomery County, supra,* mandated that the appellee property owners be afforded a right to cross-examine witnesses at the sectional map amendment hearings before the Council.

Unlike the present case, *Hyson* involved a single lot piecemeal rezoning. The basic

question before the Court was whether the Montgomery County zoning ordinance required that cross-examination be permitted at the hearing on the application for reclassification. It was contended that since the Council was acting in a quasi-judicial capacity, it was required to conduct a "trial-type" hearing, at which parties were entitled as a matter of right to cross-examine witnesses.

The provisions of the zoning ordinance involved in *Hyson*, now §§ 59–204 and 59–207 of the County Code (1972) (the same sections as are involved in the present case), provide for a public hearing in connection with an application for an amendment of the zoning map. Section 59–204 affords any interested person "the right to submit oral or written testimony or documentary evidence into the record at the hearing"; it also provides that "a complete stenographic report . . . and a typewritten transcript thereof" shall be made; that the transcript, the application for the amendment, the zoning map, and all exhibits shall be considered as parts of the record; and that "evidence [offered at the hearing] which is immaterial, irrelevant, or unduly repetitious may be excluded." Section 59–207 provides that the Council shall deter-

mine the merits of the application "on the basis of the evidence of record."

It was in "the light of these provisions" of the zoning ordinance that the Court in *Hyson* said that it was required to "determine . . . the type of public hearing which the Council was required to afford, and the nature of the functions exercised by the Council at such hearing . . . ." 242 Md. at 64, 217 A.2d at 584. While the Court recognized that the actual act of zoning and rezoning was legislative or quasi-legislative in nature, it said that it was "inaccurate to characterize the whole proceeding at the hearing held by the Council when considering an application for reclassification and its action of denying or granting reclassification as quasi-legislative in nature or quasi-judicial in nature." *Id.* Referring to §§ 59–204 and 59–207 of the zoning ordinance, the Court said that there provisions "required the . . . Council to resolve disputed questions of adjudicative facts (as contradistinguished from legislative facts or judicial *action*) concerning particular parties." *Id.* "Adjudicative facts" were recognized by the Court, citing 1 Davis, *Administrative Law Treatise*, § 7.02 (1958) [hereinafter cited as *Treatise*],

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as "roughly" the kind of facts that go to a jury in a jury case. The Court said:

> "[W]hen the Council was considering and determining these adjudicative facts concerning particular parties, it necessarily was performing a quasi-judicial function, even though its final action, in granting or denying the reclassification which was required to be based upon its findings of adjudicative facts, was quasi-legislative in character." 242 Md. at 65, 217 A.2d at 584.

The Court concluded that §§ 59–204 and 59–207 of the zoning ordinance conferred quasi-judicial functions upon the Council in making its determination of the facts at the piecemeal rezoning hearing and that a reasonable right of cross-examination must be allowed. It said at 67, 217 A.2d at 585:

> "The authorities seem to be in accord that when an administrative board or agency is required to hold a public hearing and to decide disputed adjudicative facts based upon evidence produced and a record made, that a reasonable right of cross-examination must be allowed the parties. Professor Davis, *op. cit.*, § 7.05, states the proposition in this manner: 'When the adjudicative facts are in dis-

pute, our legal tradition is that the party affected is entitled not only to rebut or explain the evidence against him but also to "confront his accusers" and to cross-examine them.' We have no intention of attempting to promulgate a comprehensive rule respecting the type or the amount of cross-examination that the Council must provide at hearings on applications for reclassification. The rationale of the cases and authorities is that reasonable cross-examination, which is required for a full and true disclosure of the facts, having due regard to the circumstances of each particular case, the nature of the proceedings, and the character of the rights which may be affected by it must be permitted; and that is as far as we are required to go at this time." (Footnote omitted.)

The lower court in the present case rejected the argument that *Hyson* applied only to piecemeal rezoning hearings. It said that the Council performed a quasi-judicial function in developing the record and it could make no distinction between procedures to be followed at local and sectional map amendment hearings because the requirement that the determination be made on the basis of the evidence of record, and upon the merits, applied equally to both types of map amendment hearings. The lower court concluded that there was no significant distinction between the type of facts or parties involved in the piecemeal rezoning in *Hyson* and those involved in the instant case. It said that the Council's decision in each case was based upon the same type of facts, *i. e.*, both were "adjudicatory in character." The lower court concluded that the due process clause of the Fourteenth Amendment did not mandate the result which it reached, but rather that the right to cross-examine was based "purely" upon the provisions of the zoning ordinance, as construed in *Hyson*. The court ultimately narrowed its holding; it said that cross-examination need not be extended to the parties in all comprehensive rezoning hearings but "where comprehensive rezoning is effected by a sectional map amendment which adopts a sector plan and consequently rezones property within a CBD, the District Council must afford to the parties, upon request, a reasonable opportunity for cross-examination."

[497] [7] Properly to be inferred from a statutory right to a public hearing on a zoning map amendment application is a right to a fair hearing in all respects, including the privilege of introducing evidence and the duty of deciding in accordance with the evidence. *Ford v. Baltimore County*, 268 Md. 172, 300 A.2d 204 (1973); *Heath V. M. & C. C. of Baltimore*, 187 Md. 296, 49 A.2d 799 (1946). There is, of course, no literal requirement in §§ 59–204 or 59–209 that a right of cross-examination must be afforded to interested persons at map amendment hearings. *Hyson* implies the existence of that right in piecemeal rezoning cases. It views the right as one of fundamental importance in such cases, which exists either as a requirement of due process or by reason of the right to a public hearing itself, because the facts to be determined are deemed adjudicative and the Council's function as quasi-judicial in nature. We have reaffirmed the rationale of *Hyson* in later zoning cases, none of which, however, involved comprehensive rezoning.[10] The re-

10. *See Birckhead v. Board of County Comm'rs*, 260 Md. 594, 273 A.2d 133 (1971); *Bayer v. Siskind*, 247 Md. 116, 230 A.2d 316 (1967); [footnote continued]

sult reached in *Hyson* was premised largely on the distinction drawn between adjudicative and legislative facts by Professor Davis in his *Treatise*, but our reliance on that work may have been unwarranted. Indeed, Professor Davis has criticized our holding in *Hyson*, suggesting that even in piecemeal rezoning hearings no adjudicative facts are involved. He said in the 1970 Supplement to his *Treatise*:

> "The [*Hyson*] court quoted from § 7.05 of the Treatise that cross-examination should be allowed when adjudicative facts are in dispute, but it did not demonstrate that adjudicative facts were in dispute. A concurring judge persuasively argued that cross-examination was unnecessary because what the Council was doing was rezoning of four acres, a legislative function. The concurring judge objected to the court's requirement of cross-examination, 'Professor Davis to the

Town of Somerset v. Board, 245 Md. 52, 225 A.2d 294 (1966); *Gorin v. Board of County Comm'rs*, 244 Md. 106, 223 A.2d 237 (1966). *See also* Annot., 27 A.L.R.3d 1304 (Right to Cross-Examination of Witnesses in Hearings before Administrative Zoning Authorities) (1969).

contrary notwithstanding,' but he cited no Davis position to the contrary. Nor could he, for that position is that opportunity for cross-examination should be required if but only if adjudicative facts are in dispute."

Davis, *Administrative Law Supplement*, § 7.04, at 323 (1970).

[8, 9] We recognized in *Chevy Chase Village v. Board*, 249 Md. 334, 239 A.2d 740 (1968), that a "judicial" or "trial-type" hearing is not a requirement of procedural due process where an administrative agency does not act in a quasi-judicial capacity and the facts to be determined are "legislative" rather than adjudicative in nature. *See also Albert v. Pub. Serv. Commission*, 209 Md. 27, 120 A.2d 346 (1956). The difference between adjudicative and legislative facts is not easily drawn; Professor Davis says that adjudicative facts are facts about the parties and their activities, businesses and properties. They usually answer the questions "of who did what, where, when, how, why, with what motive or intent" while legislative facts "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." Davis,

Treatise, § 7.02. The difference, broadly speaking, involves whether the decision is to be made on individual or general grounds. Davis, *Treatise*, § 7.04. Simply because an individual has a protected interest does not entitle him to a trial-type hearing where the matter to be determined involves issues of legislative fact. Davis, *Administrative Law of the Seventies*, §§ 7.00–1—7.00–11 (1976). That the effect of a zoning authority's decision may dramatically affect an individual is not determinative of the difference between adjudicative and legislative facts; rather, it is the nature of the decision's fact-finding process, not the ultimate effect of the decision, that determines the party's right to an adjudicatory hearing. *Powelton Civic Home Own. Ass'n v.* [498] *Department of H. & U. Dev.*, 284 F.Supp. 809, 830 (E.D.Pa.1968).[11]

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11. The court there said (p. 829) that where the decisions to be made by the administrative agency require factual findings on the particular status of a particular individual an adjudicatory hearing may be necessary; but where the decisions rest on more general findings requiring analysis and evaluation of factors not uniquely related to any specific individual, no such hearing would be required.

[10, 11] The appellants contend, and we agree, that in comprehensive rezoning proceedings the Council does not consider and determine adjudicative facts concerning particular parties within the contemplation of our decision in *Hyson*. A real distinction exists between piecemeal and comprehensive rezoning hearings; it lies in the nature of the basic function being performed by the zoning authority in each case. In a local map amendment proceeding in Montgomery County, the zoning authority considers a single piece of property and must make a factual determination, based on evidence of record, as to whether there has been a change in the physical character of the neighborhood where the property is located or a mistake was made in the original zoning. Piecemeal rezoning hearings, therefore, contemplate an adversary or trial-type procedure to resolve adjudicative facts. A different determinative standard applies where the Council is considering a comprehensive rezoning by the sectional map amendment process; there its focus is not on a single piece of property, but rather on a considerable number of properties as they relate to each other and to the surrounding area. The Council in that in-

stance considers whether the comprehensive rezoning takes into account future public needs and purposes; whether it is designed to provide an adequate potential for orderly growth in the future and to satisfy local and regional needs; and ultimately whether it bears the requisite relationship to the public health, safety and general welfare. As appellants correctly point out, these are not adjudicative determinations affecting one property owned by one person, but instead are classically legislative determinations designed to affect local and regional needs and all property owners within the planning area. The procedure is fundamentally legislative and no significant quasi-judicial function is involved. That the Council determined the zoning for each specific property owned by the various appellees and considered the impact of traffic and environmental constraints upon the scale of permissible development within the CBD does not alter the basic fact that the issues for determination were legislative, not adjudicative, and did not require a judicial or trial-type hearing. *See South Gwinnett*

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12. *Rev'g* 482 F.2d 389 (5th Cir. 1973), *cert. denied*, 419 U.S. 837, 95 S.Ct. 66, 42 L.Ed.2d 64 (1974).

Venture v. Pruitt, 491 F.2d 5 (5th Cir. 1974) (en banc); [12] *Fasano v. Board of County Com'rs of Washington Cty.*, 264 Or. 574, 507 P.2d 23 (1973); *Fleming v. City of Tacoma*, 81 Wash.2d 292, 502 P.2d 327 (1972). Accordingly, we hold that there was no constitutional or other right arising from §§ 59–204 and 59–207 to cross-examine witnesses at the sectional map amendment hearings involved in this case. Indeed, in its most recent pronouncement on the subject, the Supreme Court has indicated that it would not constitute a deprivation of procedural due process if no hearing was permitted either in a piecemeal or comprehensive rezoning action. *See Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). *See also Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915); *San Diego Bldg. Contr. Ass'n v. City Coun. of San Diego*, 13 Cal.3d 205, 118 Cal.Rptr. 146, 529 P.2d 570 (1974), *appeal dismissed*, 427 U.S. 901, 96 S.Ct. 3184, 49 L.Ed.2d 1195 (1976).

(6)

The lower court also relied upon *Hyson* in holding that the Council's resolution grant-

ing the sectional map amendment required reversal because the appellee property owners were afforded only eight minutes each to testify at the sectional map amendment hearings. It said that *Hyson:*

[499] "makes it clear that where a legislative body must make its decision on 'evidence of record', and that record making requires an adjudicatory fact finding process, the legislative body must comply with due process requirements. The District Council's action in announcing a time limitation and, in effect, denying the appellants a fair opportunity to participate in the record making process by presenting direct evidence or rebuttal testimony after cross-examination directly contravenes the holding of *Hyson*, supra. That is not to say that fair limitations cannot be made as to repetitious or irrelevant testimony, but as the matter stands the District Council's action in announcing the eight minute time limitation was arbitrary and capricious and requires a reversal of this rezoning."

In *Hyson*, our predecessors said that zoning authorities have discretion "to regulate, reasonably, the length of time afforded parties to present their evidence" and that

"[w]hether constitutional or statutory requirements, or the elements of fair play and impartiality have been violated in this regard should also be decided on a case to case basis." 242 Md. at 69–70, 217 A.2d at 587. We think the lower court erred as a matter of law in concluding, in the circumstances of this case, that the eight-minute time limitation was arbitrary and capricious.

The appellee property owners were accorded the most time to present evidence at the hearing, *i. e.*, eight minutes each, or almost five hours collectively for the 37 individual property owners involved. Pooling of time was permitted in order to make joint presentations, if desired, and each property owner was afforded the right to submit written material and exhibits without restriction. Each property owner was permitted to rebut any evidence offered into the record without regard to the eight-minute time limit. The Council advised all property owners a week in advance of the hearing as to the time limits that would be imposed. Two days were consumed by the Council in conducting the hearings and massive amounts of evidence previously submitted during the sector plan hearings

were incorporated into the record, much of which presented the views espoused by and on behalf of the appellee property owners.

[12] *Wash. County Taxpayers Ass'n v. Board*, 269 Md. 454, 306 A.2d 539 (1973), involved a public hearing before a county Planning Commission on a proposed comprehensive plan at which a three-minute time limit was imposed on each speaker. We there noted the necessity for imposing reasonable time limitations upon speakers at public hearings involving widespread public interest. We found the three-minute time restriction there imposed, when coupled with the right to submit supplemental written statements, to have been reasonable in the circumstances and not to have impaired the validity of the hearing. To similar effect, *see Freeland v. Orange County*, 273 N.C. 452, 160 S.E.2d 282 (1968). *See also Reed v. California Coastal Zone Conservation Com.*, 55 Cal.App.3d 889, 127 Cal. Rptr. 786 (1975).

We think the appellee property owners were not deprived of any constitutional or other right arising under § 59–204 of the zoning ordinance by reason of the imposition of the challenged time constraint.

What the Council did in the circumstances of this case, everything considered, was both reasonable and fair and in substantial compliance with the legislative mandate. Particularly when considered in conjunction with the opportunity afforded the property owners to submit evidence into the record to supplement their oral presentations, the eight-minute limitation did not compromise their right effectively to make their views known to the Council.

(7)

The appellees next contend that the Council's action in adopting the Sector Plan and the sectional map amendment was unlawful because in creating the new CBD zones it violated the provisions of Maryland Code, Art. 66D, § 8–101 by illegally delegating its zoning power "[to determine] the density and distribution of population," vis-
[500] a-vis, the optional method of development of the CBD zones, to the Montgomery County Planning Board of the Planning Commission.[13]

13. The members of the Planning Commission appointed by the Montgomery County Council constitute the Montgomery County Planning Board. Art. 66D, § 7–111.

As heretofore indicated, the CBD zones are authorized by §§ 59–51.3, .4, and .5 of the County Code (1975 Cum.Supp.); they provide for a standard and an optional method of development. The zones were intended to encourage residential and commercial development at densities supportable by existing and proposed public facilities which would be compatible with the surrounding areas. A property with a CBD zoning classification may, under the provisions of the zoning ordinance, be developed as a matter of right in accordance with the standard method of development, or if it contains a minimum of 22,000 square feet, the owner may apply for the optional method of development which permits more intense development but provides for open spaces and other facilities and amenities. *See, e. g.*, § 59–51.3(a). Unlike the standard method, the optional method of development requires approval of the Planning Board upon compliance with specified development standards and after detailed site plan review. The property owner is required to file a detailed application with the Planning Board under § 59–31.2 of the zoning ordinance for the optional method of development and submit a site plan and

other detailed information. A public hearing is mandated and the Planning Board, in order to approve an application, must find that it meets certain designated requirements enumerated in § 59–31.2(e)(1) and (2) and that the detailed site plan complies with specified factors contained in § 59–31.3.

The optional method of development is not, as appellees suggest, a separate and distinct zone over which the Planning Board exercises exclusive control contrary to the Regional District Act. It is, as its designation implies, an optional method for developing property located in a CBD zone which has been legislatively predetermined to be compatible with uses within the zone; it may be utilized or not, at the option of the property owner. The Planning Board does not determine the density and distribution of population. The Council in its legislative capacity enacted the CBD zones with predetermined maximum allowable densities and it delegated to the Planning Board the administrative function of determining, pursuant to carefully drawn procedural guidelines, including site plan review, the actual appropriate density for a specific

property up to legislatively specified maximum densities. *See, e. g.*, § 59–51.3(f)(1)b.

[13, 14] Executing the policy of a zoning ordinance is an administrative function that may be properly delegated to administrative boards or officials under specified procedural guidelines. 8 McQuillin, *Municipal Corporations* § 25.35 *et seq.* (3rd ed. rev. 1976); *Baltimore County v. Mo. Realty*, 219 Md. 155, 148 A.2d 424 (1959); *Huff v. Bd. of Zoning Appeals*, 214 Md. 48, 133 A.2d 83 (1957); *Pressman v. Barnes*, 209 Md. 544, 121 A.2d 816 (1956). We see no illegal delegation of zoning powers to the Planning Board in this case.[14] Nor is there merit in the appellees' argument that the standards and guidelines contained in § 59–31.2 of the

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14. Section 59–31.2(e)(4) was declared invalid by the lower court on the ground that it constituted an improper delegation of the zoning power to the Planning Board. That subsection provided that "The fact that an application complies with all of the specific requirements and purposes of the applicable zone shall not be deemed to create a presumption that the application shall be approved." The lower court held that the provision was severable and no appeal was taken from that determination; we do not pass on the question.

zoning ordinance to govern the exercise of the delegated powers are not sufficiently clear to prevent arbitrary interpretation and discriminatory application, or to assure an applicant approval under the optional method of development, given the meeting of certain minimum conditions. *Compare Pr. George's County v. M & B Constr. Co.*, 267 Md. 338, 297 A.2d 683 (1972); *Knudsen*
[501] *v. Montgomery County*, 241 Md. 436, 217 A.2d 97 (1966); *Beall v. Montgomery County*, 240 Md. 77, 212 A.2d 751 (1965); *Costello v. Sieling*, 223 Md. 24, 161 A.2d 824 (1960); *Rockshire Civic Ass'n v. Rockville*, 32 Md. App. 22, 358 A.2d 570, *cert. denied*, —— Md. —— (1976); *Marathon Oil Co. v. Township of Plymouth*, 25 Mich.App. 399, 181 N.W.2d 668 (1970); *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968).

(8)

[15, 16] Appellees next contend that the CBD zones violate the uniformity requirements of Maryland Code, Art. 66D, § 8–102, which provide that "all [zoning] regulations shall be uniform for each class or kind of building throughout any district or zone, but the regulations in one district or zone may differ from those in another district or

zone." They argue that they are denied uniformity of treatment in four particulars, viz:

"1. As compared to property owners in other CBD's within the same zoning district, the permitted FAR (floor area ratio) is limited under the new CBD zones so that parking accommodations in excess of fifty percent (50%) of stated requirements are computed as part of the building FAR. On the other hand, in Bethesda (another Central Business District within the same planning district), property owners are allowed to meet the parking requirements, and at the same time, utilize fully the maximum FAR.

"2. As applied, the CBD zones do not provide uniformity of treatment for properties similarly situated . . . [because] only those properties of 22,000 square feet or more are eligible for the 'Optional Method of Development' (which allows a density of 2 to 2.5 times that of the standard method of development).

"3. [T]he CBD zones fail to assure there will be no discrimination . . . [because] the Planning Board in both the 'Optional Method of Development' application process (§ 59–31.2) and 'Site Plan

Review' (§ 59–31.3) has complete authority to dictate and specify to an applicant that his development will be approved only if it conforms to the use and density recommendations set forth in the adopted Sector Plan.

"4. The non-conforming use provisions of the CBD zones, §§ 59–51.3(g), 59–51.4(g) and 59–51.5(g) impose substantial and severe hardships upon many property owners in that sound buildings constructed prior to 1959 (*e. g.*, Woodward and Lothrop on parcel 2) are treated as non-conforming uses, while buildings constructed after 1959 are given a grace period from the effect of the ordinance for seven (7) years."

The uniformity provision contained in Art. 66D, § 8–102 was derived from § 2 of the Standard State Zoning Enabling Act, as to which it was said in 1 Anderson, *American Law of Zoning* § 5.22 (2d ed. 1976), that the purpose of the provision was mainly a political rather than a legal one, *i. e.*, to give notice to property owners that there shall be no improper discriminations. *See Dupont Circle Cit. Ass'n v. Dist. of Col. Zoning Com'n*, 355 A.2d 550 (D.C.App.), *cert. denied*, 429 U.S. 966, 97 S.Ct. 396, 50

L.Ed.2d 334 (1976); *Orinda Homeowners Committee v. Board of Supervisors*, 11 Cal. App.3d 768, 90 Cal.Rptr. 88 (1970). We have also recognized that invidious distinctions and discriminations in applying the uniformity requirement are impermissible. *City of Baltimore v. Mano Swartz, Inc.*, 268 Md. 79, 91, 299 A.2d 828 (1973); *Marathon Builders, Inc. v. Polinger*, 263 Md. 410, 422, 283 A.2d 617 (1971); *Cassel v. City of Baltimore*, 195 Md. 348, 354, 73 A.2d 486 (1950). The uniformity requirement does not prohibit classification within a district, so long as it is reasonable and based upon the public policy to be served. *Quinton v. Edison Park Development Corp.*, 59 N.J. 571, 285 A.2d 5 (1971); *Schmidt v. Board of Adjustment of City of Newark*, 9 N.J. 405, 88 A.2d 607 (1952); *Dupont Circle, etc., supra.* The focus is upon the terminology of the ordinance, rather than upon its application. *Green Point Sav. Bank v. Board of Zoning Appeals*, 281 N.Y. 534, 24 N.E.2d 319 (1939), *appeal dismissed*, 309 U.S. 633, 60 S.Ct. 719, 84 L.Ed. 990 (1940). *See Richmark Realty*
[502] *v. Whittlif*, 226 Md. 273, 173 A.2d 196 (1961); *City of Baltimore v. Byrd*, 191 Md. 632, 62 A.2d 588 (1948).

[17] Applying these principles, the lower court found no violation of the uniformity provision in the requirement that a certain portion of the FAR be designated for parking in the Friendship Heights CBD but not in the Bethesda CBD located in the same district. Bethesda, unlike Friendship Heights, is located in a special parking lot district. See County Code (1972), Ch. 60. Section 59–1 of the County Code, which defines the term "gross floor area," provides:

". . . Parking for either retail or office uses provided in the amount of fifty percent or less than that required by section 59–79 shall not be computed as part of the gross floor area [an element of FAR]; however, parking for such uses provided in excess of fifty percent of the stated requirements of this chapter shall be counted as part of the gross floor area. . . ."

Section 59–79 delineates the requirements for off-street parking for designated uses including retail and office uses, while § 59–66(a) provides that the off-street parking requirements of § 59–79 shall not apply within parking lot districts. Since the appellees' properties are not located in a parking lot district, they must provide off-street parking, 50 percent of the area of which is computed as part of their gross floor area, thus reducing the amount of area usable for retail or office purposes. That properties located in parking lot districts are not so restricted does not in itself violate the uniformity requirements of § 8–102 of Art. 66D. Those properties must either pay a parking lot district tax or provide their own off-street parking in which event they are subject to the provisions of § 59–1 of the County Code. As a consequence, all property uses which do not rely on county operated parking facilities have their gross floor area calculated in the same manner, while all property uses located within parking lot districts which do not rely on county operated facilities have their gross floor area calculated in the same manner.

[18] Nor do we find a lack of uniformity in the requirement that properties must have a minimum of 22,000 square feet to qualify for the optional method of development. The zoning regulations apply uniformly to all parcels less than 22,000 square feet as well as those in excess of that area. The Council determined that the optional method of development would not be suitable for parcels less than 22,000 square

feet,[15] and the lower court held, and we agree, that the legislative purpose of encouraging land assembly to permit cohesive development and to assure open spaces and other amenities provides a reasonable basis for the classification.

The lower court considered the appellees' third claim of violation of the uniformity requirement to be premature. It said:

> "[Appellees] challenge uniformity based upon the Planning Board's authority to allocate different F.A.R.'s to different parcels within the Friendship Heights CBD. . . . [T]his challenge is premature because none of the [appellees] have yet applied for the optional method of development. Until it can be established that the Planning Board has allocated different F.A.R.'s to different parcels in violation of the uniformity requirement there is no issue upon which the Court can rule."

We agree with the lower court.

15. The Adopted Sector Plan indicates the rationale and purpose for the area requirement. It is there stated:

> "Fragmentation of land holdings has been a major obstacle to attractive and coordinated development of the CBD's. In order to encourage land assembly that will permit more cohesive development and assure provision of open space, pedestrian walks, and other amenities, the new system permits property owners who meet a minimum acreage requirement (22,000 square feet) to elect to use an alternative optional method of development. The optional method allows the developer somewhat higher density than can be achieved under the standard methods—but only if provisions for open space and other facilities and amenities specified by the sector plan are included."

With respect to the provisions of the new CBD zones pertaining to nonconforming
[503] structures, § 59–51.3(g) (CBD–1, by way of example) provides:

> "Any buildings, structures, or uses for which a building permit was issued after December 31, 1958, shall not be regarded as a nonconforming use in that they may be continued, structurally altered, or repaired, or enlarged in conformance with the requirements of this zone so long as they remain an otherwise lawful use as previously allowed.
>
> "Any buildings, structures or uses which become nonconforming upon reclassification of property to this CBD zone shall not be subject to the provisions of sections 59–187, 59–188 and 59–189 for a period of seven years thereafter."

Sections 59–187 and 59–188 deal, respectively, with structural alterations, and change and abandonment of nonconforming uses, while § 59–189 concerns reconstruction of damaged or destroyed buildings.

[19] While noting that pre-1959 uses are differentiated from post-1959 uses, the lower court found no lack of uniformity in the nonconforming use provisions of the CBD zoning categories. We agree. The Council's purpose, as appellants point out, was to alleviate the impact of its newly created CBD zones by providing that buildings for which building permits were issued after December 31, 1958, are not nonconforming. As to buildings for which permits were issued prior to January 1, 1959, the Council provided that buildings, structures or uses which become nonconforming upon reclassification to a CBD zone shall not be subject to the provisions of §§ 59–187, 59–188, and 59–189 for a period of seven years. This difference in treatment is neither arbitrary nor invidiously discriminatory, but affects alike all properties similarly situated.

(9)

Appellees contend that the provisions of the zoning ordinance relating to the optional method of development of the CBD zones represent a confiscatory exercise of the police power. Although recognizing that the optional method is not mandatory, they nevertheless argue that its use unconstitutionally requires the dedication of public amenities like open-air plazas, quasi-public recreational facilities, community parks and illegal buffer zones. They claim that the CBD zones were superficially designed to have a purported standard method of development in order to satisfy the requirements of the "reasonable use" test prescribed in *Rockville v. Stone*, 271 Md. 655, 319 A.2d 536 (1974), when in actuality so many limitations were imposed on that method of development that no use could ever be made of it. As a result, they say that they are frustrated in the use of their property unless they apply for and submit to the exactions and limitations required for development under the optional method. In effect, therefore, the argument is that the CBD zones deny them all reasonable use of their properties and are, therefore, illegally confiscatory.

[20] We agree with the lower court that the appellees made no showing that they had been denied all reasonable use of their

properties under the new CBD zoning classifications. There is nothing in the record before us to demonstrate that the challenged zoning deprives the appellees of all beneficial use of their properties or that the restrictions imposed were such that the properties could not be used for any purpose. *Rockville v. Stone, supra; Montgomery County Council v. Kacur*, 253 Md. 220, 252 A.2d 832 (1969); *Baltimore City v. Borinsky*, 239 Md. 611, 212 A.2d 508 (1965); *Norbeck Village v. Montgomery County, supra.* As in *Stone*, there is nothing in the record to show that the soil or topographical conditions make it unfeasible to construct any type of building in compliance with the use requirements of the CBD zones. The record before us reveals only that permissible densities of appellees' properties have been significantly decreased; that showing is, of course, insufficient to demonstrate a confiscatory exercise of the zoning police power in Maryland.

[21] With respect to the so-called Bergdoll tract, it is argued that the 3.5 acres of this property, which was rezoned by the sectional map amendment to an R–60 classi-
[504] fication (one family, detached residential),

cannot be put to any reasonable use. Since this property lies between two parcels zoned R–H (multiple family, high-rise planned residential), it is argued that it was zoned R–60 "for the sole illegal purpose of creating a buffer area and precluding its use for any other purpose"—a violation of the principles espoused in *Spaid v. Board of County Comm'rs*, 259 Md. 369, 269 A.2d 797 (1970).

We recognized in *Spaid* that there may be lawful as well as unlawful buffer zones; that there may be a transitional zone of less intensive use properly placed between a residential use district and a district permitting commercial or more intensive use as long as the transitional use does not deprive the property owner of all reasonable use of his property. No valid claim of deprivation of all reasonable use can be made with respect to the Bergdoll property. There is no indication in the record that the 3.5 acres could not be used for the construction of single family homes. Moreover, as the appellants point out, the owners of the Bergdoll tract, which comprises a total of 18.19 acres, could develop a substantial portion of it high-rise with R–60 residential on the northern portion closest to like R–60 devel-

opment; or it could be developed PD–44, as recommended by the Adopted Sector Plan, at a density higher than was permitted by the R–H zoning in effect prior to adoption of the sectional map amendment.

(10)

Appellees' final argument is placed under the heading of "Illegal use of Floating Zones." While they do not challenge the validity of the floating zone concept as a proper and lawful zoning tool, it is generally argued that the Council "has acted in excess of its zoning power by enactment of the CBD ordinance." Appellees repeat their earlier argument that the CBD zones leave only a residuum of permissible development as a matter of right, and they claim that any significant development must be sought under the optional method of development through approval of the Planning Board. As a result, appellees maintain that this system of zoning is an unlawful departure from the standard Euclidean method of zoning in that the scale of development is not determined on a comprehensive, cohesive basis but rather by a series of ad hoc planning decisions. They see this as a form of conditional zoning, unlawful in Montgomery County, as involving the imposition of zoning conditions via the use of floating zones.[16] We think the argument, although not lacking in esoteric qualities, is groundless as a matter of law.

[22] As heretofore indicated, the floating zone aspect of the CBD zones revolves around the optional method of development—a method which combines a legislative predetermination of compatible uses with detailed standards to guide its application. The CBD zones are Euclidean zones with the optional method of development "built" into the zones; that method is not itself a floating zone or a special exception, although it may have some of their characteristics. As appellants indicate, the optional method provides greater assurance of compatibility and certainty of uses than do

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16. A floating zone is a special detailed use district of undetermined location, a district in which the proposed kind, location, size, and form of structures must be preapproved, and which, like a special exception use, is legislatively predeemed compatible with the areas in which it may thereafter be located on a particular application, provided specified standards are gratified and actual incompatibility is not revealed. *Chatham Corp. v. Beltram*, 243 Md. 138, 220 A.2d 589 (1966).

most floating zones since it has been legislatively predetermined to be compatible only with those uses within the particular CBD zone. We think the utilization of the optional method of development within the CBD zones was well within the zoning powers granted to the Council; it does not constitute any form of invalid conditional zoning proscribed by the zoning ordinance and our decision in *Mont. County v. Nat'l Capital Realty*, 267 Md. 364, 297 A.2d 675 (1972). *Compare Swarthmore Co. v. Kaestner*, 258 Md. 517, 266 A.2d 341 (1970); *Huff v. Bd. of Zoning Appeals, supra.*

[505] ***ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSING RESOLUTION 7-1849 OF THE MONTGOMERY COUNTY COUNCIL VACATED; CASE REMANDED FOR THE ENTRY OF AN ORDER IN CONFORMITY WITH THIS OPINION; COSTS TO BE PAID BY THE PARTIES IDENTIFIED IN THE OPINION AS THE APPELLEE PROPERTY OWNERS.***

APPENDIX B

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

[dated July 15, 1976]

IN THE MATTER OF THE APPLICATION OF THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND:	:	
APPLICATION NO. F-947, FOR AMENDMENT TO THE ZONING ORDINANCE MAP, COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND, SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT LOCATED WITHIN MONTGOMERY COUNTY	:	Law Nos. 40639, 40661, 40663, 40665, 40666, 40667, 40668, 40669, 40670, 40676

MEMORANDUM OPINION AND ORDER

The captioned cases were consolidated for the purpose of argument because the issues raised on appeal are similar. The appellants seek review of the action of the County Council of Montgomery County, sitting as a District Council for that portion of the Maryland-Washington Regional District lying within Montgomery County, in adopting Resolution No. 7-1849 on July 16, 1974. That Resolution granted Zoning Application F-947 thereby amending, by sectional map amendment, the Zoning Ordinance with respect to properties within a new designated central business district in the special taxing district of Friendship Heights and the Hills.

Jurisdiction of this Court is founded upon Section 85-78A of the *Montgomery County Code* (1972 Ed.) and upon Rules B-1 through B-12 of the *Maryland Rules of Procedure.* Zoning, like other exercises of the police power, is subject to judicial review so as to determine whether it is arbitrary, capricious or confiscatory, and accordingly, whether a particular zoning ordinance is a valid exercise of the police power. Appellants have raised certain issues regarding text amendments enacted prior to the adoption of the Sectional Map Amendment. They argue questions of estoppel, contract zoning and certain other matters not properly before the Court in this appeal.

The Court has reviewed the entire record of the proceedings below, with special attention to the Joint Record Extract prepared by the parties*, and has read and considered the authorities cited by the litigants in memoranda and during the four days of argument. For purposes of deciding the issues presented, it is necessary to review briefly the events which bring these cases before the Court.

In January, 1964, the Maryland-National Capital Park and Planning Commission (hereafter Planning Commission) adopted a comprehensive zoning guide known as the General Plan for Montgomery and Prince George's Counties. The General Plan contains five Central Business Districts (CBD's) in Montgomery County, one of which is in the Friendship Heights area. The General Plan designates Wisconsin Avenue, the primary roadway leading into and out of Friendship Heights, as the main transportation artery for the northwestern section of

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* References to page numbers in the Joint Record Extract are pre-fixed by the letter "E".

Washington metropolitan area. In October, 1970, the master plan for the Bethesda-Chevy Chase Planning Area (hereafter, Master Plan), implementing the General Plan, was adopted by the Montgomery County Council. That Plan envisions Bethesda-Chevy Chase as being transformed from a fringe suburb to an inner suburb by reason of increasing growth pressures along the I-270 transportation corridor, of which Bethesda is the base. See Master Plan, p. 5.

The Master Plan's major recommendations for the Friendship Heights CBD are as follows:

> "Provisions for the orderly expansion of the CBD, including encouragement of multi-use developments, with adequate public amenities, such as open space.
>
> Provisions for orderly development around the transit station through comprehensive site plan review of new developments for possible reduction in parking requirements where direct pedestrian access to the transit station entrance is available and extension of the arterial street system.
>
> Protection of surrounding single-family neighborhoods by the provision of park buffer areas and transitional uses."

The Master Plan contemplates considerable population and employment growth in the area, and notes that with the advent of rapid rail transit (METRO) growth will intensify. The Plan then states, at page 18,

> "A detailed development plan should be prepared, in cooperation with the District of Columbia authorities for the entire Friendship Heights area. . . ."

In addition, the Master Plan notes that the then existing types of zones are inadequate to plan properly for

CBD's, and recommends development of new types of zones. See Master Plan, pp. 16, 20, 25 and 26.

By Resolution No. 7-270, introduced and adopted June 22, 1971, the County Council created a "Citizens Advisory Committee to Study Zoning in Central Business Districts and Transit Station Areas" (hereafter, Advisory Committee). The purpose of the Advisory Committee was to study, and to advise the County Council and the Montgomery County Planning Board concerning, the creation of new zones for CBD's and Transit Station Areas throughout the county. The resolu- contained several "whereas" clauses relating to planning policies*, and set forth broad constraints upon the Advisory Committee's work.

The final report of the Advisory Committee was transmitted to the County Council on January 9, 1973. The Advisory Committee recommended the adoption of three new zoning categories designated CBD-1, CBD-2 and CBD-3, each to contain a "standard method of development" and an "optional method of development." The latter use allows greater density but has a minimum lot size requirement and requires developers to submit to site plan review. CBD-3 allows the most intense development, and CBD-1 allows the least intense. The standard by which density is measured is Floor-Area Ratio (F.A.R.). The CBD zoning categories are set forth in Sections 51.3, 51.4, and 51.5 of the Zoning Ordinance (Chapter 59, Montgomery County Code (1972 Ed., 1974 Supp.)). The Advisory Committee's report recommends a new concept, called "sector plans," for the CBD's in

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* Among the policies is the following: [T]o implement the goals, objectives and guidelines stated in the General Plan and appropriate area master plans which relate to the development of high density areas and transit station areas."

each planning district. The apparent purpose of the sector plans is to control and regulate growth within the CBD.

In December, 1972, the Planning Commission published a preliminary sector plan for the Friendship Heights CBD. Public hearings were held on February 7, 12, 26 and 28 and on March 3, 1973. In October, 1973, another preliminary sector plan for the same area was published. This plan changed some of the zoning recommendations made in the 1972 preliminary sector plan.

On February 6, 7 and 9, 1974, hearings were held by the County Council. Three items of business were considered at these hearings: first, approval of the sector plan; secondly, a text amendment to the Zoning Ordinance which changed the CBD boundaries in Friendship Heights; thirdly, Sectional Map Amendment Application No. F-936. At the suggestion of the County Attorney the third item was withdrawn from the agenda and scheduled for a separate hearing. Thereafter, a new zoning application F-947 was filed.

Subsequent to the sector plan and text amendment hearings held in February, the Council held five work sessions in February, March and April, 1974. Then, on May 14, 1974, the Council considered the adoption of the Sector Plan. The resolution for approval failed, but was reconsidered two weeks later, on May 28. At that meeting, by Resolution No. 7-1736, the Sector Plan was approved.

Public hearings were held on July 8 and 13, 1974, for the purpose of considering Sectional Map Amendment Application No. F-947. At those meetings the County Council, through its President, set forth time limitations, stated that no cross-examination would be permitted

and allowed receipt of documents into the record, such documents to be given full consideration on an equal basis with oral presentations made before the Council. The President stated further that rebuttal as to oral testimony would be permitted within time limitations, but that no rebuttal would be permitted as to written testimony. Attorneys representing the property owners objected to the conduct of the hearing and specifically to the time limitations and the denial of cross-examination. Witnesses called included many who had spoken at prior planning board and sector plan meetings. When the hearings were concluded the Council held a work session on Monday, July 15, 1974, and President Potter announced thereafter that the record would be closed at 5:00 p.m. on that same day. The following day, July 16, 1974, Resolution 7-1849 was adopted, granting the zoning changes sought by Sectional Map Amendment Application F-947. The captioned appeals were noted as a result of the adoption of that resolution.

There are seven major issues presented in these appeals. They will be considered below in the following order:

I. IS THE SECTIONAL MAP AMENDMENT COMPREHENSIVE REZONING OR IS IT PIECEMEAL REZONING?

II. DID THE PLANNING COMMISSION AND THE DISTRICT COUNCIL ACT WITHIN STATUTORY AUTHORITY?

III. IS THERE AN ILLEGAL DELEGATION OF AUTHORITY FROM THE DISTRICT COUNCIL TO THE PLANNING BOARD?

IV. DOES THE SECTIONAL MAP AMENDMENT CONSTITUTE CONDITIONAL ZONING?

V. ARE THE SUBJECT PROPERTIES "CONFISCATED" BY THE SECTIONAL MAP AMENDMENT?

VI. DOES THE SECTIONAL MAP AMENDMENT VIOLATE THE UNIFORMITY REQUIREMENT OF THE ENABLING ACT?

VII. WERE APPELLANTS DENIED CERTAIN PROCEDURAL DUE PROCESS AT THE SECTIONAL MAP AMENDMENT HEARINGS?

I.
IS THE SECTIONAL MAP AMENDMENT COMPREHENSIVE REZONING OR IS IT PIECEMEAL REZONING?

The appellants contend in their briefs and in oral argument that the adoption of Sectional Map Amendment Application No. F-947 was merely a series of local map amendments and not comprehensive rezoning. If the Map Amendment constitutes comprehensive rezoning, it is entitled to the same presumption of validity and correctness as an original zoning, and the appellants have a heavy burden of overcoming that presumption. *Ark Readi-Mix Concrete Corp. v. Smith,* 251 Md. 1 (1964); *Scull v. Coleman,* 251 Md. 6 (1968). If the map amendment is local (piecemeal) then the "change-mistake rule" applies. See *Cassel v. Mayor and City Council of Baltimore,* 195 Md. 348, 354 (1950).

Section 59-195, *Montgomery County Code* (1972 Ed., 1974 Supp), reads as follows:

> Application for amendment of the zoning map may be in the form of
> (a) A local amendment covering a single tract, all portions of which are proposed to be classified in the same zone; or all portions of which are proposed to be classified in one of two alternative zones.
> (b) A sectional plan amendment covering a section of the Maryland-Washington Regional District, por-

tions of which may be proposed to be classified in different zones.
(c) A district plan amendment covering the entire Maryland-Washington Regional District within the County.

Comprehensive rezoning was recently defined in *Grooms v. LaVale Zoning Board,* 27 Md. App. 266, 277 (1975), where the Court stated:

> "The indicia of "comprehensiveness" in a zoning plan are well established. A comprehensive zoning plan is one which applies to or covers a substantial or wide geographical area. It must be well thought out and based upon considerations concerning the common needs of the particular area. In other words, it must be the product of careful consideration and extensive study. It must be designed to control and direct the use of land and buildings according to present and planned future conditions, so as to accomplish, as far as possible, the most appropriate uses of land consistent with public interests and the safeguarding of the interests of the individual property owners. Other characteristics of comprehensiveness may be found in the fact that it zones all, or substantially all, of a political subdivision, that it regulates all uses – good, bad and indifferent, or that it covers all of the usual factors of land utilization: height, area and use (cases omitted). The fact that few changes in zoning are made does not affect the comprehensive nature of the plan."

The indicia of comprehensiveness set forth by Judge Davidson in *Grooms* are synthesized from the texts of several Court of Appeals cases, including *Trustees of McDonough v. Baltimore County,* 221 Md. 550 (1960);

Huff v. Board of Zoning Appeals, 214 Md. 48 (1957); *Anne Arundel County v. Ward,* 186 Md. 330 (1946).

The first indicium of comprehensiveness is that the plan apply to over cover a wide or substantial geographical area. The Sectional Map Amendment in question rezones only forty-one acres of a total of 140,000 acres in the zoning district. Appellees point out, however, that the area included in the Sectional Map Amendment includes the e ntire Friendship Heights CBD. Nevertheless, it is a small area when compared with the entire Bethesda-Chevy Chase Zoning District and it would seem that the first requirement has not been met. In support of their contention that the total area here involved is too small appellants cite the case of *Hewitt v. County Commissioners of Baltimore County,* 200 Md. 48 (1959), in which the Court held that an area of 15 to 20 square miles was large enough to satisfy the geographical requirement of a comprehensive plan. The *Hewitt* case, however, relied upon the case of *County Commissioners of Anne Arundel v. Ward,* 186 Md. 330 (1945). The *Ward* case involved the issue of the authority of the County Commissioners under the enabling act to zone only selected residential districts and to leave open other areas in which uses are not restricted. The Court held that the actions of the County Commissioners constituted comprehensive rezoning within the purview of *Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365 (1926). The following excerpt from the *Ward* opinion has been followed consistently by the Maryland courts:

> "The enabling act calls for a comprehensive plan, but we think such a requirement is met, if due consideration is given to *the common needs of a particular district.* No doubt such needs will vary with

each area zoned." 186 Md. at p. 340 (emphasis added).

It is evident from examining *Scull v. Coleman, supra, Hewitt v. County Commissioners of Baltimore, supra,* and more recent decisions that it is not necessary to rezone substantial areas per se for the zoning action to be considered comprehensive rezoning. When the Bethesda-Chevy Chase Master Plan was adopted in 1970 it was noted that the Friendship Heights CBD would be studied at a later date as a part of the comprehensive planning process. It is largely as a result of those studies that this sectional map amendment has been adopted. The Court is of the opinion that the geographical requirement for comprehensive rezoning is satisfied, because the rezoning purports to meet the common needs of a sizeable portion of the intensely developed Bethesda-Chevy Chase Zoning District.

The next indicium of comprehensiveness is that of careful consideration and extensive study, correlated to the common needs of a particular area. The appellees state in their brief that in *Grooms v. LaVale, supra,* a period of eight to ten months was held to satisfy this requirement. The following language from that case is pertinent:

> "For a period of eight to ten months before the plan's proposal and submission to the public the Board gave it careful consideration and extensive study . . . . [T]wo public hearings were held . . . The Board reviewed the nature and extent of the then existing land classifications and uses. The availability and adequacy of public facilities such as water, sewers, and roads, were taken into account. The *present and future needs of the citizens of the LaVale Zoning District and of Allegany County*

> *were explored thoroughly.* 27 Md. App. at 278 (emphasis added)

The underscored language above is the crux of what is necessary to satisfy the requisite studies; they must be thorough and must give due consideration to the public nature of the rezoning. The planning process here involved is lengthy – the record extract alone is almost 2,000 pages. The Court turns, therefore, to the nature and thoroughness of the studies.

The report of the Advisory Committee considered not only the CBD's themselves, but areas surrounding them, and the rest of the county as well. That study was aimed at developing new zoning tools, as recommended by the Master Plan, to enhance the CBD's and thereby benefit the public at large. Recommendations as to particular actions to be taken in any given CBD were not made. The raison d'etre of the Advisory Committee was not to recommend particular zones for particular parcels of land, but simply to advise the County Council and the Planning Board on legislation.*

A reading of the record reveals that much weight was given to studies done on traffic capacities of the feeder road system, air pollution, sewerage and open space requirements. If each item is considered in a vacuum, then it might be said to be local in nature, as appellants contend. However, these studies are, first of all

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*The final report of the advisory committee is not a part of the administrative record before us. It is, however, a matter of public record which directly relates to the matter at hand and is included only for the purpose of informing the reader of the report's proper place in the planning process. Cf., *Aspen Hill Venture v. Montgomery County Council*, 265 Md. 303 (1972).

interrelated, and secondly, done in light of the effect which METRO will have.

It must be stressed at this point that the Friendship Heights CBD is a major retail area, and is a transportation center for the entire north-west metropolitan area. Studies were done which are directly related to the safety, the health, the comfort and the convenience of persons traveling to, from and through the CBD. In addition, there is an indication that the sewer and water problems which exist for the county at large would be aggravated by continued growth in the Friendship Heights CBD. This issue is fairly debatable; therefore the question must be resolved in favor of the appellees.

Next, the appellees argue that the Sectional Map Amendment cannot be comprehensive rezoning because it is not in conformity with the Master Plan. The Maryland law permits a sectional map amendment as a valid amendment to an existing master plan. (See Part II of this opinion.) The appellants question the right of the District Council to relate back to prior studies – they contend the zoning action in question is contrary to the General and Master Plans and not, as in *District Land,* supra, an action which brings the property into conformity with previously existing plans. They argue that the District Council must rely solely on the evidence produced in support of this zoning application and that the evidence is insufficient in depth and scope to make the zoning comprehensive. The answer to this is that the Court is not convinced that the Sectional Map Amendment is contrary to the General Plan and the Master Plan.

It is true that the Sectional Map Amendment does modify the Master Plan in certain respects. See Sector

Plan, p. 53. However, after a thorough review of the record, the Court is not convinced that the Sectional Map Amendment effects zoning changes as radically different from the Master Plan as the appellants contend. The District Council has made a legislative determination that the adopted Sectional Map Amendment does conform with the Master Plan. It is settled law that the Court will not interfere with legislative decisions unless they be arbitrary, whimsical, discriminatory or illegal. See *Trustees of McDonough,* supra, at p. 565. The Court is of the opinion that the new plan does not depart so far from the Master Plan as to require the Court to rule invalid the integrated planning process.

A sectional map amendment may be enacted for one of two purposes: first, it may bring land uses into conformity with a master plan (e.g., *Montgomery County Council v. Leizman,* 268 Md. 621 (1973)); or secondly, it may change the policy decisions inherent in a master plan if sufficient studies have been done (Cf., *Nottingham Village, Inc., v. Baltimore County,* 266 Md. 339 (1972)). It is the Court's opinion that even if the new zoning did not conform to the Master Plan, sufficient studies were done to support enactment of the Sectional Map Amendment.

The Court holds that the zoning action here meets the most important of the indicia of comprehensiveness as set forth in *Grooms v. LaVale Zoning Board,* supra. In addition, there is no question that this map amendment is designed to control and direct the use of land and buildings according to present and planned future conditions.

The appellants have failed to meet their heavy burden of overcoming the presumption that this

comprehensive rezoning is valid on the record as it stands, absent cross-examination of witnesses. (See Part VII of this opinion.) The Court therefore finds that the action of the District Council in adopting Sectional Map Amendment Application No. F-947 was not arbitrary, capricious or whimsical, and that it is valid comprehensive rezoning.

II.

DID THE PLANNING COMMISSION AND THE DISTRICT COUNCIL ACT WITHIN STATUTORY AUTHORITY?

The zoning authority of the District Council is derived from Article 25A Section 5(X) and Article 66B, *Annotated Code of Maryland.* The Regional District Act is set forth in Chapter 85 of the *Montgomery County Code.* It is the contention of the appellants that since the Planning Commission had no specific statutory authority to adopt sector plans the District Council had no power to approve a sectional map amendment which, in effect, enacted that sector plan.

Section 85-11, *Montgomery County Code* (1972 Ed.), gives to the Planning Commission

> "the right to exercise all powers and functions granted to it in this chapter."

Among the powers specifically granted are the powers to make and adopt general and local master plans, to make amendments thereto, and to propose zoning laws. See Section 85-63(b). The appellants maintain that because there is no express provision for the adoption of sector plans by the Planning Commission there is no such authority. This view of the Planning Commission's function and powers is unduly narrow. The provisions

of the Regional District Act noted above give to the Planning Commission, by implication, the authority to make and adopt sector plans as amendments to local master plans. A sector plan, like a master plan, is only a recommendation which need not be adopted or followed by the District Council. The Commission acted well within its authority in recommending proposed zoning changes.

The appellants' argument that the zoning process is somehow perverted by a total lack of coordination between the Sector Plan and Master Plan has no bearing on the authority of the Planning Commission to propose a sector plan as an amendment to the zoning map. Section 85-78(b) provides that, prior to the adoption of a map amendment by the Council, the application must be first submitted to the local Planning Board for suggestions. The obvious purpose of these provisions is to insure proper study of any map amendment application before adoption, thus maintaining fairness to all concerned and preventing hasty or arbitrary action by the Council. The fact that this required recommendation happens to be called a sector plan does not invalidate the District Council's actions. It is a recommendation required by law, but does not bind the District Council. The Court is of the opinion that both the Planning Commission and the District Council acted within their statutory authority.

III.

IS THERE AN ILLEGAL DELEGATION OF AUTHORITY FROM THE DISTRICT COUNCIL TO THE PLANNING BOARD?

The appellants' contend that there is an improper delegation of the legislative authority to zone from the District Council to the Montgomery County Planning Board.* There is no question that the District Council, or any legislative body, may delegate certain of its powers to subordinate agencies for the purpose of carrying into effect an ordinance, provided that the guidelines and standards established are of a clear and sufficient nature. The appellants contention is that under the enabling legislation the District Council alone is authorized to zone and that the ordinance in question delegates to the Planning Board the entire zoning authority.

As noted earlier in this opinion each of the CBD zoning categories imposed on the subject property by the Sectional Map Amendment provides two methods by which property may be developed – a standard method and an optional method. Under the standard method of development every property owner has the right to develop his property in accordance with certain designated densities (measured by F.A.R.), height limits, lot coverages, and open space and setback requirements. This is, of course, Euclidian type zoning. No one has contended that the limitations imposed are not a proper subject for the exercise of the zoning authority. There are no site plan review requirements.

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*The Montgomery County Planning Board consists of those members of the Planning Commission appointed from Montgomery County.

The optional method of development allows greater density of use, provided that certain strict requirements are met. The stated purpose is to provide certain public amenities and facilities not otherwise available. This purpose is accomplished through provision for optional method of development application approval, and through extensive and detailed site plan review. (See Zoning Ordinance, Sections 31.2 and 31.3, respectively.) The decision of the Planning Board with regard to optional development is final and there is no statutory provision for appeal.

Appellants and appellees alike have conceded that the optional development method is in the nature of a floating zone. The elements of a floating zone are set forth in *Bigenho v. Montgomery County Council,* 248 Md. 387 (1968). The elements are that the use must be compatible with the surrounding neighborhood, must further the purposes of the proposed reclassification, and that special precautions must be applied to insure that there will be no discordance with existing uses. In the present case it cannot be seriously contended that all of these elements are not present. One of the earliest Maryland cases on floating zones, *Huff v. Board of Zoning Appeals,* 214 Md. 48 (1958), said the following:

> "It is clear that Manufacturing, Restricted classification is analogous to a special exception, and the rules which are applicable to special exceptions would apply, not the general rules of original error or change in conditions or the character of the neighborhood that control the propriety of rezoning. This is because, as in the case of special exception, there has been a prior legislative determination as part of a comprehensive plan that the use which the administrative body permits upon application to the particular case of the

specified standards is *prima facie* proper in the environment in which it is permitted. This prior determination and the establishment of sufficient standards effectively refute the claim of improper delegation of legislative power."

The rule of *Huff* supra, and other cases cited by appellants and appellees is that, given the fact that the legislature has predetermined the compatibility of uses, and absent any fact or circumstance in a particular case which would change this presumptive finding, this use must be allowed by the administrative body. The District Council has predetermined that the uses set forth in the CBD zones under the optional method of development are compatible with surrounding land uses and with the general welfare. It is the Court's opinion that there are sufficient guidelines to aid the Planning Board in its administrative decision as to whether or not an application for optional method of development under a CBD zone meets the requirements set forth.

The appellees contend that, given sufficient guidelines, the entire legislative authority may be delegated. For this proposition they rely on the cases of *Clark v. County Commissioners for Carroll County*, 270 Md. 343 (1973), and *Prince Georges County v. M & B Construction Co.*, 267 Md. 338 (1972). These cases are easily distinguished in that there is specific statutory authority for the Planning Commission to approve subdivision plats as they did in those cases. Here there is no specific legislative authority to delegate the entire zoning function to the Planning Board. In the absence of statutory authority permitting delegation of the entire zoning function or a part thereof, the optional method of development would necessarily have to be approved by the Planning Board when the guidelines set

forth by the District Council have been met. In the present case upon examination of Section 31.2(e) of the Zoning Ordinance, one finds extensive guidelines by which the Planning Board is to guide its conduct in either approving, approving with modifications, or disapproving applications for optional method of development. Subsection (e)(3) provides that the applicant has the burden of going forward with the evidence and the burden of persuasion on all questions to be determined by the Planning Board. The crux, and indeed the failure, of this ordinance lies in subsection (e)(4), which reads as follows:

> "The fact that an application complies with *all* of the specific requirements and purposes of the applicable zone *shall not be deemed to create a presumption that the application shall be approved.*" (emphasis added)

All of the cases cited by appellees supporting their position on this issue concern the exercise of discretion by administrative bodies. Where those cases differ from the issue at hand is that in every case cited a denial may be premised upon the absence of certain factors. However, where these factors are not absent the administrative board has no discretion – they must grant the application. *Tighe v. Osborne*, 150 Md. 452 (1926), is in point. There the City of Baltimore delegated to the Zoning Commissioner the right to deny "Use" permits if, in his discretion,

> "the proposed buildings or structures, use, or changes of use would create hazards from fire or disease or would menace public security, health or morals." 150 Md. at 456.

The Commissioner was also given guidelines upon which to make this determination. The delegation of authority and the sufficiency of the guidelines both were upheld:

> "It is thus apparent that the ordinance does not vest unlimited discretion in the Zoning Commissioner. He *cannot refuse a permit* unless building or its proposed use would menace the public security, health or morals. He is required to secure information about and give consideration to all the matters just enumerated in reaching a decision; and finally, he is bound by numerous decisions of this court as to what does and does not bear a substantial relation to the public security, health or morals. 150 Md. at 458. (emphasis added).

In this case, the Planning Board exercises a delegated power to determine densities and certain open space requirements, which is analagous to the power exercised in *Tighe*, supra, i.e., the power to deny certain uses of property. Generally, a legislative body may not delegate its entire function, thereby divesting itself of the ultimate decision making authority. There appears to be no case in Maryland that allows such a delegation of power in the absence of specific statutory authority.

The Court is of the opinion that the guidelines are at least as extensive and specific as the guidelines in *Tighe*, and, in fact, they are more detailed. In the *Tighe* case, the discretion of the Zoning Commissioner was limited to denial of use only if he made a factual determination of noncompliance. In the case at hand even though an application for the optional method of development may conform exactly to the requirements set forth in the Zoning Ordinance and the Sector Plan, the Planning Board, under Section 31.2(e)(4), may deny the application. This an improper delegation of the entire zoning authority.

Appellees contend that the question of optional zoning is not before the Court in this appeal because none of the property owners have, as yet, applied for the optional method of development. That statement may be correct when considering the immediate effect on the respective properties with regard to whether or not the Ordinance creates conditional zoning at this time. However, the issue here deals with the validity of the Zoning Ordinance in its entirety. Usually, matters relating to invalidity of ordinances and statutes, and constitutional authority to enact them, may not be collaterally raised in zoning appeals, but such matters may be raised when they directly affect the appellants as in this case.

Section 1-4, *Montgomery County Code* (1972 Ed.), states as follows:

> "The provisions of this code are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable or any person or circumstances such illegality invalidity or unconstitutionality or inapplicability shall not effect or impair any of the remaining provisions. . . ."

The Court holds that Section 31.2(e)(4) of the Zoning Ordinance effects an illegal delegation of legislative authority to the Montgomery County Planning Board, but that it is severable and does not invalidate the entire ordinance. The action of the County Council in approving that subsection is declared improper and without force of law.

IV.

DOES THE SECTIONAL MAP AMENDMENT CONSTITUTE CONDITIONAL ZONING?

The appellants argue that the floating zones found in the CBD optional methods of development are conditional zoning by virtue of the manner in which they are imposed. The argument is that the Planning Board does not determine the compatibility of the floating zone use with existing uses but dictates or forces compatibility through its demands in the site plan review process. The appellants maintain that those exactions will vary from property to property. This, they assert, is conditional zoning which is impermissible in Montgomery County. See *Montgomery County v. National Capitol Realty Corp.*, 267 Md. 364 (1972); *Bayliss v. Mayor and City of Baltimore,* 219 Md. 164 (1959); and *Wakefield v. Kraft,* 202 Md. 136 (1953).

The Montgomery County Zoning Ordinance, Section 207(d) states:

> "No application for a local or a sectional or a district plan map amendment shall be approved conditionally for the erection on the land of a structure at a particular location or within a particular time or by a particular person or of a particular type or for the subdivision of the land in a particular manner or on any other condition."

The effect of the ordinance and the cases cited by the appellants leaves no doubt that the invalidity of conditional zoning in Montgomery County is a closed question. However, this argument concerning conditional zoning revolves around the distinction between unlawful conditional zoning and the imposition by sectional map amendment of floating zones. In the

latter, as previously discussed in this opinion, the legislature makes a predetermination of the compatibility of floating zone uses with existing uses. Special precautions are applied to insure that there will be no discordance with existing uses. These precautions include such restrictions as building location and style, minimum and maximum use of the area, minimum setback from the street and requirements that a site plan be approved. See *Bigenho v. Montgomery County Council*, supra, at 386-391. The Court has found no case, nor have appellants pointed the Court to a case which holds that it is unlawful to apply floating zones by sectional map amendment and that such action amounts to conditional zoning.

The cases in the State of Maryland which discuss conditional zoning deal with properties for which an application for reclassification was submitted, i.e. piecemeal zoning. The case of *Bayliss v. Mayor and City Council of Baltimore*, supra, states that the peculiar hardship test applicable to special exceptions and variances does not apply to piecemeal reclassifications involving a revision to a comprehensive plan and a change in the zone or district. If conditions were permitted to be attached in special cases to allow inconsistent uses in such a district it would destroy the uniformity required by state legislation. Nevertheless, the use of a floating zone has been specifically authorized in Maryland in a number of cases as noted heretofore. The use of the floating zone avoids the evils of conditional zoning by permitting consistent uses throughout the zone where compatibility has been predetermined by the legislative body.

The Court declared section 31.2(e)(4) of the Zoning Ordinance void and of no further force or effect. With

this provision stricken the CBD zoning categories, in conjunction with the procedures for approval of an application for optional method of development and for detailed site plan review, appear to constitute lawful floating zones. The Court's opinion in this regard is dictum only, because it is improper to decide at this time whether or not these floating zones as applied constitute unlawful conditional zoning. None of the appellants have applied for the optional method of development under the CBD zoning category applicable to their respective properties. It may be that in the future that the Planning Board will exact such conditions from certain property owners so as to make the optional method of development conditional zoning, but the matter is not properly before the Court for review at this time.

V.

ARE THE SUBJECT PROPERTIES "CONFISCATED" BY THE MAP AMENDMENT?

The appellants contend that the action of the District Council imposing CBD zones on their property amounts to an illegal and confiscatory use of the police power. They allege at least four types of confiscatory action:

1. Governmental action resulting in substantial reduction of property values which deprive them of the full use and enjoyment of their properties;
2. an attempt by Montgomery County to reduce the costs of future land acquisition for public projects through implementation of the Sector Plan, specifically through the capital improvements program;

3. an unconstitutional attempt to extract, without payment of just compensation, public amenities from individual property owners in the form of open air plazas, recreational facilities, community parks and alleged buffer zones; and
4. an attempt to have private property owners dedicate scenic easements for the use of the public in the form of open space requirements.

It has long been held in the State of Maryland that a property owner has no vested right to the continuance of the zoning status of his or of neighboring property, but has only the right to rely on the rule that a change will not be made unless it is required for the public good. *Wakefield v. Kraft*, supra. In making their argument the appellants rely to a large extent on the case of *Vernon Park Realty, Inc. v. City of Mount Vernon*, 307 New York 493, 121 N.E.2d 517 (1954). The New York Court of Appeals applied "the greater part of its value" test and found the zoning confiscatory. The Maryland Court of Appeals had occasion to consider the New York rule in *Mayor and Council of Rockville v. Stone*, 271 Md. 655 (1974), and rejected that test. The proper test under the Maryland law is that a property owner must demonstrate a denial of all reasonable use of the property under a new zoning classification. See *Rockville v. Stone*, supra, and *Franklin Construction Co. v. Welch*, 215 Md. 715 (1968). This is a functional test rather than an economic test as is used in the State of New York. The appellants have not borne their burden of showing that they have been denied all reasonable use of the property under the new CBD zoning classifications. The Court therefore holds that the action of the District Council in rezoning the properties to the CBD

categories does not amount to illegal or confiscatory use of the police power.

The appellants contentions with regard to the requirement of "extracting" certain public amenities from individual property owners are without merit. This argument applies only to the optional method of development and the site plan review process undertaken pursuant to Sections 31.2 and 31.3 of the Zoning Ordinance. Each property owner is entitled, as of right, to develop his property in accordance with the standard method of development in the CBD zoning category which is applied to his property. While the property owners may be dissatisfied and contend that they cannot use their property to its maximum economic potential, each property owner has the reasonable use of his property under the standard methods of development. That is all the law of this State requires at this time.*

*The Court is aware of the recent decision by a Federal Court holding that the Sectional Map Amendment under consideration constituted a confiscatory taking with regard to one of the tracts involved. See *Donohoe Construction Co. v. Planning Commission*, Civil No. Y-74-1210 (D.Md., June 4, 1976). That decision was based upon certain testimony not present in the administrative record before this Court in this appeal. The Court is bound by Rockville v. Stone, supra.

VI.

DOES THE SECTIONAL MAP AMENDMENT VIOLATE THE UNIFORMITY REQUIREMENTS OF THE ENABLING ACT?

Section 85-76, Montgomery County Code (1972 Ed.) states:

> [E]ach District Council may divide the portion of the regional district lying within its county into districts and zones of such number, shape or area as it may determine. Within such districts and zones the district council may regulate the erection, construction, reconstruction, alteration and uses of building, structures and the uses of land, including surface, subsurface and air rights therein. Both districts and zones may be created; all such regulations shall be uniform for each class or kind or building throughout any district or zone but the regulations in one district or zone may differ from those in any district or zone."

Such a statute, based on Section 2 of the Standard State Zone Enabling Act published by the United States Department of Commerce in 1926, is traditionally included in all zoning laws. See Rathkopf, *The Law of Zoning and Planning* (4th Ed. 1975) Section 8.03(1).

There are few Maryland cases concerning violations of the uniformity requirement. The Court shall proceed to examine the few cases in point. In *Mayor and City Council of Baltimore v. Byrd*, 191 Md. 632 (1948), the appellants passed a zoning ordinance waiving, as to the property owner, the provisions of another ordinance prohibiting the erection of a gasoline station within three hundred feet of a theatre, basing their rationale upon the contention that it would relieve traffic conditions. The specific issue before the Court of

Appeals was whether the subject property could be specially treated under the Zoning Ordinance. After holding that the circumstances were not special the Court determined that the excepting ordinance violated uniformity provisions in that it treated this lot owner on a more favorable basis vis-a-vis other lot owners similarly situated because it gave him a special exception without justifiable reasons:

> "In any event we cannot find that there is any public reason why these particular lots should be allowed the privilege which is denied to other lots similarly situated in the city." Supra, at p. 640

In *Richmark Realty Co., Inc. v. Whittlif*, 226 Md. 273 (1961), the Court considered a factual situation virtually identical to that in *Byrd*, supra. The Court expressly affirmed *Byrd* for the proposition that special exceptions can be made only in harmony with the intent of a zoning ordinance. They stated that the zoning ordinance must be uniform and in accord with the comprehensive plan and that the 300 foot rule may be amended only by an act which affects all properties in all parts of the city equally.

Prince George's County v. M & B Construction Corporation, 267 Md. 338 (1972), concerns approval of subdivision cluster development and delegation of authority to the Planning Commission. With regard to the uniformity requirement the Court stated:

> "[I]t may be observed that any property owner in the respective residential zones may apply for cluster development. *Chrinko v. South Brunswick Township Planning Board*, 77 N.J. Super. 594. 187 A.2d 221 (1963).

The *Chrinko* case is discussed at page 358 of the opinion. The Court of Appeals notes that the *Chrinko* case concerns a permitted use, subject to approval by the Planning Board. The New Jersey Court upheld the procedure, saying that it was not a violation of uniformity in that the procedure "accomplishes uniformity, *because the option is open to all developers within a zoning district and escapes the vice that it is* compulsory" 267 Md. 358 (emphasis added).

The holding of *Marathon Builders, Inc. v. Polinger*, 263 Md. 410 (1967), is distinguishable from the present case; however, the case has some bearing on the uniformity issue at hand. The Court of Appeals noted in passing that zoning ordinances must apply uniformly to the land in the zoning district and must not be discriminatory.

The focus of the uniformity requirements set forth in the cited cases is upon the terminology of the ordinance and the guarantees therein that all land owners will have uniformity of treatment, not necessarily conformity of use. See also *Green Point Savings Bank v. Board of Zoning Appeals of Town of Hempstead*, 281 N.Y. 534, 24 N.E.2d 319 (1939); *Mandis v. Gorski*, 265 N.Y. Supp. 2d (1965); *Orinda Home Owners Committee v. Board of Supervisors*, 11 Ca. App. 3rd 768, 90 Cal. Rptr 88 (1970).

In support of their allegations appellants have advanced four contentions. The first of these contentions is that the usable floor area for retail or office uses in the Friendship Heights CBD is less than that of properties in the Bethesda CBD, which is within the same zoning district. The argument is that because the Friendship Heights CBD is not located in a parking

district, it is therefore subject to Ordinance 7-46, which provides that parking accommodations in Friendship Heights in excess of fifty per cent of certain requirements are to be computed as part of the gross floor area. Property owners in the Bethesda CBD are within a special parking district, are not subject to Ordinance 7-46, and may therefore fully utilize the maximum F.A.R. permitted. It is the Court's opinion that the requirement that a certain portion of the F.A.R. be designated for parking in a non parking lot district, free of a parking lot tax, is a reasonable requirement and does not violate the uniformity provisions of the zoning law. Such a discrepancy is not unique to the CBD categories, but exists between parcels in any zone where one is in a parking lot district and another is not.

Secondly, appellants contend that the 22,000 square foot minimum area requirement for optional method of development violates uniformity. This argument is devoid of merit. The District Council has predetermined that the optional method of development is not suitable for parcels of less than 22,000 square foot areas. The legislative purpose of encouraging land assembly to permit cohesive development and to assure open space and other amenities provides a reasonable basis for the classification.

Thirdly, appellants challenge uniformity based upon the Planning Board's authority to allocate different F.A.R.'s to different parcels within the Friendship Heights CBD. This argument is more pertinent to the issues of delegation of authority and conditional zoning discussed earlier in the opinion. In any event, this challenge is premature because none of the appellants have yet applied for the optional method of development. Until it can be established that the Planning Board has allocated different F.A.R.'s to different parcels in violation of the uniformity requirement there is no issue upon which the Court can rule.

Appellants' final contention concerns the nonconforming use provisions of the Zoning Ordinance. Sections 51.3(g), and 51.4(g) and 51.5(g) of the Zoning Ordinance read as follows:

> "Any buildings, structures, or uses for which a building permit was issued after December 31, 1958, shall not be regarded as a nonconforming use in that they may be continued, structurally altered, or repaired or enlarged in conformance with the requirements of this zone so long as they remain in otherwise lawful use as previously allowed.
>
> Buildings, structures and uses which become nonconforming upon reclassification of property to (a CBD zoning category) shall not be subject to the provisions of Section 59-187, 58-188 and 59-189 for a period of seven years thereafter."

Section 59-187 deals with structural alterations of nonconforming uses and Section 59-189 concerns reconstruction of damaged or destroyed buildings. See *Grant v. City of Baltimore*, 212 Md. 301 (1957). Appellants' sole complaint is directed to the different treatment of properties built before and after 1958. The effect of subsections (g) set forth above centers upon a seven year grace period given to buildings, structures and uses which become nonconforming under the other sections of the Zoning Ordinance upon reclassification of the property to a CBD zoning category. There is no doubt that pre-1959 uses are differentiated vis a vis post-1959 uses. The reasons are

set forth in the opinion accompanying Ordinance 8-8, adopted March 11, 1975, wherein it was stated:

> "This proposed amendment was introduced to preserve the relatively new buildings located in central business districts whose size, bulk and use would prohibit their modernization or reconstruction under the central business district zones of (the CBD zoning categories). Thus, certain sound structures in the central business district will not be protected by changing the cutoff date by which buildings and structures would become nonconforming uses. . . .
>
> The phrase 'in conformance with the requirements of this zone', was added to make clear the amount of enlargement that could occur to buildings or structures in the central business district zones."

The Court finds no lack of uniformity in the nonconforming use provisions of the CBD zoning categories. The Sectional Map Amendment being comprehensive rezoning, there is the same presumption of validity as an original zoning. The appellants have the burden of overcoming that presumption. They have presented neither authority or rationale for the proposition that they assert. There being a presumption of the validity of a legislative act, it is the Court's opinion that the treatment of pre-1959 and post-1959 buildings by the District Council is properly a matter for the District Council and will not be interfered with by the Court.

VII.

WERE APPELLANTS DENIED CERTAIN PROCEDURAL DUE PROCESS AT THE SECTIONAL MAP AMENDMENT HEARINGS?

The appellants' final contention does not deal with statutory power, proper legislative action or discriminatory laws, but rather with the procedure used for effecting the Section Map Amendment.

The appellants assert that the procedure adopted by the County Council in developing the record is improper. Specifically, they allege that they were denied sufficient time to present evidence; that the atmosphere of the hearings was such that the hearings were neither fair nor orderly; and that they were denied the right to cross-examine witnesses.

It is apparent from the record that a limitation of eight minutes each was placed on landowners wishing to testify. Interested persons were given the opportunity to submit documentary evidence. Although the record was left open for an unusually short period of time, there is no showing by the appellants that they did not have sufficient time to submit what ever documentary evidence they deemed appropriate, or that they were in any way prejudiced by the Council's action in that regard. (See E-31, 32 and E-41 to 47.) Further, the transcripts of the Sector Plan hearings were made part of the record (Sectional Map Amendment Hearing, July 8, 1974, at T.7-T.9). The Court of Appeals has upheld a shorter time limitation on parties in *Washington County Taxpayer Association Inc. v. Board of County Commissioners,* 269 Md. 454 (1973). That case, however, can be distinguished by the fact that the hearings there were held, not by the zoning authority,

but by the Planning and Zoning Board, an administrative agency. ***BiMetallic Insurance Company v. State Board of Equalization,*** 239 U.S. 441, (1915) likewise upheld a time limitation.

The rationale of these cases permits advance announcements of time limitations with regard to hearings before executive or legislative bodies so that governmental functions cannot be unduly delayed. However, the holding in the case of *Hyson v. Montgomery County,* 242 Md. 55 (1966), as explained below, makes it clear that where a legislative body must make its decision on "evidence of record", and that record making requires an adjudicatory fact finding process, the legislative body must comply with due process requirements. The District Council's action in announcing a time limitation and, in effect, denying the appellants a fair opportunity to participate in the record making process by presenting direct evidence or rebuttal testimony after cross-examination directly contravenes the holding of *Hyson,* supra. That is not to say that fair limitations cannot be made as to repetitious or irrelevant testimony, but as the matter stands the District Council's action in announcing the eight minute time limitation was arbitrary and capricious and requires a reversal of this rezoning.

The next contention is superfluous. The allegations are that because of catcalls and unnecessary, disruptive noises by certain persons present in the hearing room, appellants could not fully and fairly present their testimony. They rely upon *Ford v. Baltimore County,* 268 Md. 172 (1973). While it does appear that there was some disruption, even delays, the record does not indicate that it thereby became difficult for appellants to make their views known. The decorum and

atmosphere of the hearing was not so extreme so as to bring this case within the purview of *Ford v. Baltimore County,* supra.

The final argument which appellants advance is that they were denied the right to cross-examine witnesses. The primary authorities for that proposition are *Hyson v. Montgomery County,* supra, and Section 59-204 and 59-207 (a, c) *Montgomery County Code* (1972 ed.). In addition, appellants rely upon the Fourteenth Amendment, United States Constitution. Section 59-204 states, in pertinent part:

> (a) Notice of hearing:
>
> (1) Upon accepting any application under section 59-195 for filing, the department (of environmental protection) shall set the application for hearing at a specified date, time and place and shall caused to be published (certain requirements pertaining to notice) containing the following:
>
> a. The location of the property, its area, name of owner, change of classification . . . applied for and application number, if a local map amendment.
>
> b. The designation of the area covered, if a sectional or district zoning plan map amendment, and the place where copies of the map(s) may be examined. . . .
>
> (b) Availability of evidence prior to hearing. The district council may by resolution, prescribe regulations pertaining to the submission of documentary evidence into the record of any application prior to the advertised hearing date for such application.

(c) Conduct of Hearing. Any interested person shall have the right to submit oral or written testimony or documentary evidence into the record at the hearing. . . . subject to the regulations adopted by the district council under subsection (b) of this section. There shall be a complete stenographic report of the testimony at the hearing, and a typewritten transcript thereof with all exhibits admitted at the hearing including the application, shall promptly be incorporated by the department in the application file and shall be considered a part of the record on the application. The zoning map and any sectional or district zoning or highway plan map adopted by the commission for the area within which lies the land proposed to be reclassified, shall be considered a part of the record on the application. Evidence which is immaterial, irrelevant or unduly repetitious may be excluded.

Section 59-207 states:

(a) An application for a map amendment shall be decided on the basis of the evidence of record. . . .

(c) An application for a map amendment shall be either approved or denied on the merits. . . .

The Maryland Court of Appeals, in *Hyson v. Montgomery County,* supra, held that a reasonable right to cross-examination exists at hearings on applications for reclassification in Montgomery County, provided that the parties properly ask for it. The *Hyson* case involved two continguous parcels of land which had been classified R-90 (single, detached residential) by the 1950 zoning plan, and had been so zoned for many years. After applications for reclassification were filed, the Planning Board caused a staff report to be made which suggested R-T (townhouse) zoning. The Board

thereafter acted contrary to that report and recommended C-1 zoning. The District Council followed the latter recommendations despite protest from the appellants, composed of nine neighboring property owners and the "Glenmont and Vicinity Citizens Associations". See *Hyson, et al v. Wilson et al,* Law No. 16167 (Mo. County Cir., 1965). Thus, the case presented a situation factually different from the one at hand, for it involved a local map amendment. The reasoning of the Court, however, was by no means premised only upon the fact that piecemeal rezoning was involved. It is to this reasoning that we now turn.

Chief Judge Prescott, in the majority opinion, stated:

"We have no intention of attempting to promulgate a comprehensive rule respecting the type or the amount of cross-examination that the Council must provide at hearings or applications for reclassification. The rationale of the cases and authorities is that reasonable cross-examination, which is required for a full and true disclosure of the facts, having due regard for the nature of the proceedings, and the character of the rights which may be affected by it must be permitted; and that is as far as we are required to go at this time."

Early in his opinion, the Chief Judge recognized the statutory requirement for a hearing, as set forth in Sections 59-204 and 59-207 above. Based upon this requirement, he recognized the need to determine the type of hearing required and the nature of the Council's function. While noting that the final act of either granting or denying the application was purely legislative, he stated that the statutory provisions:

"make it improper and inaccurate to characterize the whole proceeding at the hearing . . . when considering an application for reclassification and . . . denying or granting (it) as quasi-legislative or quasi-judicial in nature. The above provisions, without question, required the members of the council to resolve disputed questions of adjudicative facts (as contradistinguished from legislative facts or judicial *action*) concerning particular parties . . . And, when the Council was considering and determining these adjudicative facts concerning particular parties, it necessarily was performing a quasi-judicial function, even though its final action, in granting or denying the reclassification which was required to be based upon adjudicative facts, was quasi-legislative in character." 242 Md. at 64-65.

It is clear that when the Council is engaged in determining adjudicative facts concerning particular parties it is performing a quasi-judicial function. This is not to say that the final act of the Council in either rejecting or accepting a map amendment is not legislative in character. The final action, whatever its flavor, must be based upon the evidence of record. It is in the development of the record that the Council performs its quasi-judicial function. The County Code makes no distinction between the procedures to be followed at a local map amendment hearing and a sectional map amendment hearing.* The requirement of a determination on the basis of the evidence of record and upon the merits applies equally to both types of map amendment. It is clear, then, that in order to

*There is one minor distinction – local map amendment applications may be heard before a hearing examiner.

distinguish the present case from *Hyson*, the distinction must be based upon a difference in either the type of facts or the type of parties.

As between the parties involved in *Hyson* and the appellants here, we discern a difference. The appellants in *Hyson* who won the right to cross-examine were nearby property owners and a neighborhood civic association, all of whom may or may not have been directly affected by the rezoning. In addition, several of the appellants lived approximately two miles from the reclassified property. These appellants are the property owners whose land has been reclassified and who are affected directly by the Sectional Map Amendment. Thus, the distinction drawn is in favor of the appellants.

The nature of the facts, then, becomes crucial to the issue. Fortunately, the *Hyson* case treats the factual issues in some depth. There, surrounding properties were devoted to varying uses and zoning problems were recognized as existing. Thus, the Planning Board directed its staff to study the vicinity and make recommendations. It is evident from the *Hyson* opinion that the Council made its decision based upon the availability of water and sewer, local commercial needs and traffic studies. The record here reflects that it is upon precisely these types of facts that the present decision was based. The facts in *Hyson* were adjudicatory in character, and the facts here are adjudicatory in character.

The Court should clarify its ruling. First of all, this Court does not hold that the due process clause of the United States Constitution mandates the result reached. The holding that the right to cross-examine attaches is

based purely upon a statutory right as construed in *Hyson,* supra. Sections 59-204 and 59-207 were enacted by the County Council, and they must abide by the law they enacted. Secondly, the Court does not hold that cross-examination must be extended to the parties in all comprehensive rezoning hearings – that is not the issue presented. However, where comprehensive rezoning is effected by a sectional map amendment which adopts a sector plan and consequently rezones property within a CBD, the District Council must afford to the parties, upon request, a reasonable opportunity for cross-examination. Thirdly, the Court does not envision the problems predicted by the appellees, with massive numbers of people asking the opportunity to interrogate one another. The Council cannot be heard to complain in this regard as it was their determination to consider a large number of properties in one proceeding. Similar problems have been solved in local map amendment cases by referring the matter to a hearing examiner.

Finally, the determination of what is and what is not "reasonable" should be determined by the Council on a case by case basis. That does not mean the Council can arbitrarily set time limits or cut off cross-examination at will. The word "reasonable" should be considered with regard to a proper determination of the adjudicatory facts involved. The parties asked for time to present testimony and requested cross-examination which was denied.* The action of the District Council must be reversed as the parties were not given the opportunity to participate in the development of the

*See E-1302; Sector Plan Hearings, T.422; Sectional Map Amendment Hearings, T.29, T.63-68.

record which must be the basis for the District Council's actions.

* * *

The individual appellants have raised several other issues they allege are unique to their respective properties. The arguments presented are either not properly before the Court in this proceeding or have no substantial merit. In light of the Court's holding it is unnecessary to set forth each of the individual complaints. The Court, will, however, briefly discuss certain contentions argued by individual appellants.

Appellees assert that appellant Chevy Chase Land Company has no standing to maintain this appeal with regard to Parcel 10A. This parcel is not within the CBD boundary, having been removed by text amendment prior to the Map Amendment. It is zoned R-60, with a special exception for parking. There has been no change of zoning, and the parcel is legally unaffected by the Map Amendment. The appellant presented a novel argument concerning this parcel in conjunction with air rights on adjacent parcels, but has cited no cases to support the theory. Therefore, The Appeal of Chevy Chase Land Company with respect to Parcel 10A is dismissed.

Appellants TKU Associates and Woodward and Lothrop allege that they paid $300,000 to the Washington Metropolitan Area Transit Authority in conjunction with plans to redevelop Parcel 2. The contract with WMATA and the relationship of that situation to the action of the District Council are the subject of another law suit. The parties agree that the issues arising out of that limited situation are not before the Court in this case.

With regard to Parcel K (the Elizabeth), appellants complain that once they are subjected to the nonconforming use provisions of the Zoning Ordinance, under Section 51.3(g) thereof, they will be unable to rebuild individual condominum units in the event they are destroyed by fire or otherwise. The Court appreciates the desire for guidance in this regard; however, the factual situation is much too speculative to decide at this point. This appeal must be decided upon the evidence of record, and gratuitous advice from the Court to lenders and prospective condominium owners is neither necessary nor proper. Quite simply, the controversy has yet to arise, and thus cannot be adjudicated.

For the reasons set forth above, it is this 15th day of July, 1976, by the Circuit Court for Montgomery County, Maryland,

ORDERED that the appeal of Chevy Chase Land Company with respect to Parcel 10A is dismissed; and it is further

ORDERED that the action of the County Council of Montgomery County sitting as a District Council, in adopting Resolution 7-1849 is reversed; and it is further

ORDERED that Section 59-31.2(e)(4) of the *Montgomery County Code* (1972 Ed., 1974 Supp.) is declared void as an improper delegation of authority.

/s/ H. Ralph Miller
H. RALPH MILLER
Judge of the Circuit Court
for Montgomery County, Maryland

APPENDIX C

APPENDIX OF PROVISIONS FROM THE MONTGOMERY COUNTY CODE, 1972 ED., AS AMENDED

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Sec. 59-204. Hearing procedures for map amendments.

(a) *Notice of hearing.*

(1) Upon the acceptance for filing and the scheduling for public hearing at a specified date, time and place by the appropriate body of an application under section 59-195, the department shall cause to be published once in at least two newspapers of general circulation in the county a notice of the public hearing on such application, stating the application number, date, time and place of hearing and containing the following:

a. The location of the property, its area, name of owner, change of classification or two alternative classifications applied for and application number, if a local map amendment.

b. The designation of the area covered, if a sectional or district zoning plan map amendment, and the place where copies of the map or maps may be examined.

(2) The department shall notify the applicant and the commission by mail of the date, time and place of hearing. The date of hearing shall not be less than

thirty days following the newspaper publication of the notice. All application files in the custody of the department shall be open to public inspection during regular office hours.

Such files shall not be removed from the department's office or inspected therein at other times by any person; except, that such files may be removed from such office or inspected therein at other times by any person pursuant to court order or by a member of the district council, by the county attorney or by the hearing examiner.

(b) *Availability of evidence prior to hearing.* The district council may, by resolution, prescribe regulations pertaining to the submission of documentary evidence into the record of any application prior to the advertised hearing date for such application.

(c) *Conduct of hearing.* Any interested person shall have the right to submit oral or written testimony or documentary evidence into the record at the hearing of any application subject to the regulations adopted by the district council under subsection (b) of this section. There shall be a complete stenographic report of the testimony at the hearing, and a typewritten transcript thereof with all exhibits admitted at the hearing, including the application, shall promptly be incorporated by the department in the application file and shall be considered a part of the record on the application. The zoning map and any sectional or district zoning or highway plan map adopted by the commission for the area within which lies the land proposed to be reclassified, shall be considered a part of the record on the application. Evidence which is immaterial, irrelevant or unduly repetitious may be excluded.

(d) *Deferral, postponement or continuance of hearing.* The hearing may be adjourned from time to time to a date certain on public announcement at the hearing of the earliest practicable date, time and place for resumption of the hearing or continued, suspended, deferred or postponed either to a time certain or for a reasonable period of time, by the district council or hearing examiner on public announcement at the hearing or by written notification from the district council or hearing examiner at least three days prior to the scheduled public hearing or at any time prior to the scheduling of a public hearing, if no hearing date has been scheduled, when in the discretion of the district council or hearing examiner the pendency of any preliminary or final master plan, sector plan, highway plan or amendments thereto, zoning and planning studies, capital improvements programs or projects or amendments thereto or zoning text amendments or other matters of a relevant or material nature may substantially affect applications under consideration and promote orderly zoning and planning within the regional district as well as the efficient and economical processing of local map amendment applications. Before the scheduling, rescheduling or resumption of any hearing which has been continued, suspended, deferred or cancelled which was not continued, suspended, deferred or cancelled to a time certain by the district council or hearing examiner on public announcement at the hearing the provision of subsection (a) hereof shall be complied with and the costs of readvertisement shall be incurred by the county. (Mont. Co. Code 1965, §111-47; Ord. No. 6-34, §1; Ord. No. 7-25, §4; Ord. No. 7-54, §2; Ord. No. 8-4, §1.)

Sec. 59-207. Action by district council – Generally.

(a) An application for a map amendment shall be decided on the basis of the evidence of record; provided, that any application heard by a hearing examiner may be decided solely on the basis of the hearing examiner's report.

(b) Within ten days after transmittal of the examiner's report as set forth in section 59-206(b), any person who, or association which, appeared and participated in person, in writing, or by counsel at the hearing before the examiner or any person who would be aggrieved by any decision of the council, may request, in writing, an opportunity to present oral argument before the district council prior to its rendering a decision. The district council may, in its discretion, grant or deny such request. Thereafter, the district council shall either decide the application as hereinafter provided, or reassign the application to the examiner for clarification or the taking of additional evidence, if deemed appropriate.

(c) An application for a map amendment shall be either approved or denied on the merits, or denied for want of the necessary total of affirmative votes as provided in section 59-208, or dismissed or allowed to be withdrawn. The district council may dismiss any such application if it finds that the application does not conform to any stated procedural requirements of this article, or the application is not acceptable for filing because filed within the time limitations of section 59-197, or the application is friviolous or filed for purposes of harassment. The district council may allow an applicant to withdraw his application for a local map amendment at any time; provided, that if the request

for withdrawal is made after publication of the notice of hearing, no application for the reclassification of all or any part of the land which is the subject of the application shall be allowed within the time limitations set forth in section 59-197 following the date of the resolution of the district council approving such withdrawal, unless, by the resolution allowing withdrawal or subsequent resolution, the council specifies that the time limitation shall not apply. If the application is not dismissed or allowed to be withdrawn, as herein provided, it shall either be approved or denied on the merits, or denied for want of the necessary total of affirmative votes as provided in section 59-208, in which case no application for the reclassification of any part of the land which is the subject of the application shall be accepted for filing within the limitations of section 59-197, except as otherwise provided in section 59-208. An application for a sectional or district plan map amendment shall be approved, with such modification as the district council deems appropriate, as a map amendment with the force and effect of law, or shall be denied. The district council may file an application for a map amendment at any time without due regard to limitations.

(d) No application for a local or a sectional or district plan map amendment shall be approved conditionally for the erection on the land of a structure at a particular location, or within a particular time, or by a particular person, or of a particular type, or for the subdivision of the land in a particular manner or on any other condition.

(e) No application for a local map amendment shall be approved for a class of zone other than applied for, or if application is made for two alternative classes, the

application shall not be approved for a class of zone other than one of the two applied for.

(f) No application for a local map amendment shall be approved for a greater area than that applied for, but an application may be approved for a smaller area than that applied for if the reclassification of such smaller area is supported by the evidence of record and if such smaller area is accurately delimited in the record.

(g) Any area reclassified by a local or a sectional or district plan map amendment shall exclude and be held to exclude any portion of the area which lies in the bed of a road, street, alley or rapid transit route or facility, whether existing or proposed on a plan adopted by the commission or district council. (Mont. Co. Code 1965, §111-48; Ord. No. 6-34, §1; Ord. No. 6-132, §2.)

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-834

MORTON FUNGER, et al.,

Petitioners,

vs.

MONTGOMERY COUNTY, MARYLAND, et al.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS, CITIZENS COORDINATING COMMITTEE ON FRIENDSHIP HEIGHTS, INC., ET AL.

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Respondents, Citizens Coordinating Committee on Friendship Heights, Inc., Herbert J. O'Connor, James Patterson, Marshall Lasky and Mary Lasky, respectfully submit that this Court should not issue a Writ of Certiorari as prayed in the Petition filed herein.

OPINIONS BELOW

The opinions below are described accurately in the Petition, and are appended thereto as Appendices A and B. The opinion of the Court of Appeals of Maryland in Montgomery County, Maryland, et al. vs. Woodward and Lothrop, Inc., et al., previously published unofficially at 376 A.2d 483, is now officially reported at 280 Md. 686 (1977).

JURISDICTION

The date and time of entry of the judgment sought to be reviewed and the date and terms of the order granting an extension of time within which to petition for certiorari appear to have been set forth accurately in the Petition. Jurisdiction of this Court has been invoked under 28 U.S.C. Section 1257, but the subsection thereof has not been specified. It would appear that jurisdiction, if appropriate, would only lie under subsection (3) thereof.

QUESTION PRESENTED

When a legislative body enacts a broad and general comprehensive zoning measure for a wide area which includes an entire political subdivision, does the Due Process Clause of the Fourteenth Amendment require that time limitations be removed and unlimited cross-examination be allowed when demanded by an affected property owner alleging* depreciation of the value of his land?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Certain provisions of the United States Constitution and of the Montgomery County Code (1972) are accurately set

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* The claim of reduction in value is attacked as being without merit, infra, at Page 16.

forth at Page 3 of the Petition and in Appendix C thereof. Also involved are the provisions of Sections 59-195, 59-199, and 59-200 of the Montgomery County Code (1972), which are set forth in Appendix A hereto.

STATEMENT OF THE CASE

These Respondents will not here attempt to catalogue all of the errors made by the Petitioners in their characterization of the legislative and judicial proceedings which have preceded the filing of their Petition. Suffice it to say that (1) the actions taken by the County Council for Montgomery County were carefully considered, broad-based legislative acts that did not constitute a "reversal" of the planning history of the already heavily developed Friendship Heights area; (2) the action taken with respect to the property of the Petitioners cannot, in any event, be fairly characterized as "downzoning"; and (3) the Petitioners were afforded an ample and adequate opportunity to participate in the proceedings leading to the decision ultimately reached.

Friendship Heights is a single area lying in both Montgomery County, Maryland, and the District of Columbia in the vicinity of Western Avenue (the boundary) and Wisconsin Avenue. The Maryland portion has a present population of approximately 6,000 persons and contains an entire political subdivision, Friendship Heights and the Hills. The nature of the

area was described by the Court of Appeals of Maryland in the following terms:

> "The Friendship Heights CBD (Central Business District) is compact and intensely developed; within its borders is a mixture of residential, office, and commercial development consisting of a number of high-rise, high-density apartment houses and hotels, office buildings, retail shopping centers, including several department stores, and some single family residences. It has been aptly described as an urban cross-road, a business center both local and regional in scope, with buildings of 'Manhattanlike' proportions. It is a major transportation center in the County and a rapid rail (Metro) transit station is scheduled for construction at the intersection of Wisconsin and Western Avenues by late 1980." (Appendix A to Petition, Page 6a.)

In the decade leading up to the action challenged in the instant case, various planning documents applicable to Friendship Heights warned of the inadequacy of existing zones for central business districts and urged that a detailed plan be prepared for the area in cooperation with District of Columbia authori-

ties. The recommendations of these studies culminated in the enactment of new central business district zones for use throughout Montgomery County and adoption of a "Sector Plan" for Friendship Heights. The Sector Plan constituted a detailed amendment to the local master plan and recommended the boundaries of the zoning districts that should be employed in Friendship Heights using the new central business district zones. The recommendations for the zoning districts were the product of careful study of the severe environmental constraints on the Friendship Heights area, including inadequacy of existing and proposed streets and sewers and air pollution hazards.

The Sector Plan (and the challenged zoning actions based on it) was not, as urged by Petitioners, a reversal of "most zoning and planning decisions of the previous decade for the Friendship Heights area." (Petition, Page 4) Indeed, it is rather surprising that such a suggestion is made since it was rejected by the Court of Appeals of Maryland and is not here for review. As was said in its opinion, the "Sector Plan, upon which the sectional map amendment was based, plainly constitutes the detailed development plan for the Friendship Heights CBD called for in the Bethesda-Chevy Chase Master Plan, the need for which was also recognized in the General Plan.* * *Moreover contrary to appellees' (Petitioners') suggestion, the Adopted Sector Plan is by no means fundamentally inconsistent with either the General Plan or the B-CC Master Plan; it represented but a specific

modification of the planning and zoning objectives broadly outlined in those documents based on existing land use facts." (Appendix A to Petition, Pages 29a, 30a.)

The process of implementation of the new zones and creation of the new zoning district boundaries recommended in the Sector Plan was initiated by the County Council's* filing of a "sectional map amendment" application, a comprehensive zoning process through which wide-spread zoning actions are accomplished, as opposed to individual parcel or piecemeal rezonings which are known under applicable ordinances as "local map amendments".**

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* The County Council is the general legislative body for Montgomery County, a charter county existing under the provisions of Article XI-A of the Maryland Constitution. A general grant of powers is given to all charter counties in Article 25A of the Annotated Code of Maryland, and specific zoning authority is granted to the County Council for Montgomery County in Article 66D of the Annotated Code of Maryland.

** The contrast between the comprehensive and piecemeal rezoning processes can be seen from an examination of Sections 59-195, 59-199 and 59-200 of the Montgomery County Code (1972), the provisions of which are set forth in Appendix A to this brief.

Consistent with the requirements of local law, a public hearing was held by the County Council on the comprehensive rezoning proceedings initiated by it. All major property owners (including Petitioners) were advised prior to the hearing that in light of the intense interest expressed in the proceedings, cross-examination of witnesses could not be allowed and that time limitations would be imposed on all speakers.

Although such limitations were imposed, the greatest time was allotted to property owners (8 minutes), unlimited pooling of testimony was allowed, provision was made for the submission of unlimited written materials, the Council announced that it would, and in fact did, continue the hearing until all interested persons had been heard and given the opportunity to present unlimited quantities of written materials, and time was afforded to any interested person to give rebuttal testimony without any time limitations. The last mentioned privilege was not exercised by the Petitioners. The Council also incorporated by reference the massive record of the proceedings previously conducted on the Sector Plan in which the Petitioners actively participated.

Petitioners demanded and were refused relaxation of the time restrictions and the limitation on cross-examination. In denying the request, the County Council President noted that it "would in fact be quite impractical to permit all land-owners and all other parties inter-

ested in this zoning amendment to cross-examine each of the other witnesses. Full freedom in this respect would probably occupy the remaining weeks of the summer and perhaps the fall."

Notwithstanding the foregoing limitations, a gigantic record was produced before the County Council, and just the portions thereof printed for consideration by the Court of Appeals of Maryland consumed 12 volumes and 4,995 pages. Four hundred pages, or an entire volume, were generated by the attorneys for the Petitioners.

As they do here, Petitioners argued before the County Council that approval of the proposed comprehensive zoning change would "downzone" a portion of their property. (Petition, Page 4) Prior to the zoning changes, the entire 18.19 acre tract owned by the Petitioners was zoned R-H, a zone under which "high-rise" development of 792 dwelling units would have been permissible. Following the rezoning proceedings, over 14½ acres remained in the R-H zone, while a small area of 3.5 acres was placed in the R-60 zone, a zone under which single-family homes on lots of 6,000 square feet may be constructed.

Specific reference to this action was made in the Sector Plan upon which the comprehensive rezoning was based where it was noted that in the event of R-H development, the portion of the tract zoned R-60 would provide a tapering of development in that area which is close to existing, similar development; the Sector Plan went on,

moreover, to make the "strong recommendation" that the property be developed in its entirety under the provisions of the PD-44 "floating" (non-Euclidean) zone under which development of up to 800 dwelling units could take place. Pointing to this provision of the Sector Plan, the Court of Appeals of Maryland rejected the claim of Petitioners that the rezoning had reduced allowable density of development (and thus depreciated its value) by noting that the property "could be developed PD-44, as recommended by the Adopted Sector Plan, at a density higher than was permitted by the R-H zoning in effect prior to adoption of the sectional map amendment." (Emphasis supplied.) (Appendix A to Petition, Page 68a.)

Following the hearing, the comprehensive rezoning was enacted by the County Council, and appeals taken by the Petitioners and others to the Circuit Court for Montgomery County. Appeals from the adverse decision of the Circuit Court were taken to the Court of Special Appeals of Maryland, and the Court of Appeals of Maryland granted certiorari to consider the case prior to any action by the Court of Special Appeals.

In a unanimous decision by its Chief Judge, the Court of Appeals of Maryland rejected the contention of the Petitioners that they should have been afforded trial-type rights in the comprehensive rezoning of Friendship Heights. In its opinion, the Court stated:

> "The Appellants (Respondents) contend, and we agree, that in comprehensive rezoning proceed-

ings the Council does not consider and determine adjudicative facts concerning particular parties within the contemplation of our decision in Hyson (vs. Montgomery County Council, 242 Md. 55, 217 A.2d 578 (1966)). A real distinction exists between piecemeal and comprehensive rezoning hearings; it lies in the nature of the basic function being performed by the zoning authority in each case. In a local map amendment proceeding in Montgomery County, the zoning authority considers a single piece of property and must make a factual determination, based on evidence of record, as to whether there has been a change in the physical character of the neighborhood where the property is located or a mistake was made in the original zoning. Piecemeal rezoning hearings, therefore, contemplate an adversary or trial-type procedure to resolve adjudicative facts. A different determinative standard applies where the Council is considering a comprehensive rezoning by the sectional map amendment process; there its focus is not on a single piece of property, but rather on a considerable number of properties as they relate to each other and to the surrounding area. The Council in that instance considers whether the comprehensive rezoning takes into ac-

> count future public needs and purposes; whether it is designed to provide an adequate potential for orderly growth in the future and to satisfy local and regional needs; and ultimately whether it bears the requisite relationship to the public health, safety and general welfare. * * * The procedure is fundamentally legislative and no significant quasi-judicial function is involved." (Appendix A to Petition, Pages 46a-47a.)

The decision of the Circuit Court for Montgomery County was thus reversed and the case remanded for the entry of an order affirming the action of the County Council. The Petition in the instant case followed.

ARGUMENT

These Respondents respectfully submit that the Petition should not be granted since there are neither special nor important reasons for review on writ of certiorari. The federal question resolved by the Court of Appeals of Maryland is not substantial, and has been resolved previously in applicable decisions of this Court in a manner consistent with the disposition made below. Furthermore, even if a federal question of substance is presented, the Petitioners do not appear to be appropriate parties to seek a resolution of that issue in this Court.

I.
THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT AND THE DECISION BELOW IS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

These Respondents have elected to restate the question presented since the manner in which it is posed by the Petitioners fails to take into consideration the status of the decision making body or the nature of the decision reached. Instead, Petitioners seek to have trial-type protections triggered solely by the claim that monetary loss will result from any form of governmental decision making. Such is not, nor has it ever been, the law, and the in vacuo manner in which the question is presented cannot provide the Petitioners with a successful escape route from adverse decisions of this Court.

The decision made in the instant case was not that of an administrative body exercising limited powers with respect to requests for finite zoning decisions relating to a specific piece of property. Rather, it was a legislative enactment of a legislative body possessing a general grant of the police power. The decision was not made with respect to an individual property, but rather was broad-based and affected a wide area. If, as Petitioners contend, decisions of this type could only be made after affording trial-type rights to parties claiming to be affected, general governmental decision-making would grind to a screeching halt.

This much was observed by this Court over 60 years ago in Bi-Metallic Investment Co. vs. State Board of Equalization of Colorado, 239 U. S. 441, 445, 36 S. Ct. 141, 60 L. Ed. 372 (1915), where Mr. Justice Holmes stated:

> "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meetings or in assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.* * * There must be a limit to individ-

ual argument in such matters if government is to go on." (Emphasis supplied.)

However, "individual argument" was allowed in the instant case to an extent sufficient to allow the attorneys for the Petitioners to generate over 400 pages of record materials. No limitation was placed upon the submission of written materials, and rebuttal testimony was allowed without limitation -- a right not exercised by the Petitioners.

Seeking to avoid the effect of, but not discussing, Bi-Metallic, supra, Petitioners place primary reliance upon footnote 13 in the majority opinion and the substance of the dissenting opinions in this Court's recent decision in City of Eastlake vs. Forest City Enterprises, 426 U. S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976). Their reliance, however, is sadly misplaced. Eastlake did not involve the adoption of zoning restrictions applicable to a substantial or wide area involving many properties, but rather concerned the application of an individual property owner for a financially beneficial change in the zoning of its property. Petitioners, however, erroneously attempt to gloss over the individual nature of the decision there made and place sole emphasis upon this Court's passing reference to the absence of any adverse monetary impact of the decision. They then point to comments made by Mr. Justice Stevens in his dissenting opinion concerning the claimed unfairness of the procedure in that case.

In citing the opinion of Mr. Justice Stevens, however, the Petitioners fail to

point out that the cases relied upon by him concerning procedural rights of parties in zoning proceedings related solely to individual properties. Indeed, the distinction between individual and comprehensive zoning proceedings is stressed in the quotations contained in his dissenting opinion from recent, leading state cases on the subject.

For example, in Fasano vs. Board of County Commissioners, 264 Ore. 574, 580-581, 507 P. 2d 23, 26 (1973), quoted at 426 U. S. 684, the Supreme Court of Oregon noted that "(o)rdinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon Constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test." (Emphasis supplied.) To the same effect is Fleming vs. City of Tacoma, 81 Wash. 2d 292, 298-299, 502 P. 2d 327, 331 (1972), quoted at 426 U. S. 684-5.

Clearly, then, the procedures employed in the instant case were consistent with the views of both the majority and the dissenters in Eastlake. Nor is anything in the decisions relied upon by Mr. Justice Stevens in his dissent or in the majority opinion supportive of the proposition that monetary consequences

alone should trigger the existence of trial-type due process rights.

The same distinction between piecemeal and comprehensive zoning proceedings as was made below and in Fasano and Fleming was embraced and then abandoned, by the United States Court of Appeals for the Fifth Circuit in South Gwinnett Venture vs. Pruitt, 482 F. 2d 389, rehearing granted 487 F. 2d 1333, certiorari dismissed, 416 U. S. 901, 94 S. Ct. 1625, 40 L. Ed. 2d 119, en banc decision 491 F. 2d 5 (5th Cir., 1973), certiorari denied, 419 U. S. 837, 95 S. Ct. 66, 42 L. Ed. 2d 64 (1974). There, trial-type rights were denied even in piecemeal proceedings. And, in San Diego Building Contractors Association vs. City Council of the City of San Diego, 13 Cal. 3d 205, 118 Cal. Rptr. 146, 529 P. 2d 570, appeal dismissed, 427 U. S. 901, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1976), the Supreme Court of California, citing Bi-Metallic, supra, rejected an attack upon the adoption of a broad and general zoning ordinance by initiative where no hearing had been held, stressing the same differences in the nature of the decision as have been discussed above. The decision below is consistent with Bi-Metallic, South Gwinnett and San Diego Building Contractors. As with the latter two cases, review should also here be denied.

II.
THE PETITIONERS ARE NOT PROPER PARTIES TO RAISE THE QUESTION PRESENTED.

The Petition in the instant case is laced with references to the action of the County Council as a "downzoning". Although it might be arguable that this theme could be sounded by other Friendship Heights property owners, it is clear that Petitioners are not in a position to argue that the comprehensive rezoning of Friendship Heights denigrated the use or depreciated the value of their land.

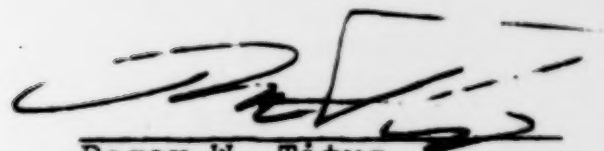
As has been noted above in the statement of the case, the Friendship Heights comprehensive rezoning left undisturbed the prior zoning of over 80% of the property of the Petitioners. Furthermore, as was pointed out by the Court of Appeals of Maryland, development of the Petitioner's property in accordance with the PD-44 development recommended by the Adopted Sector Plan would result in a density higher than was permitted by the R-H zoning in effect prior to adoption of the sectional map amendment.

Clearly, then, the Petitioners have suffered neither a denigration of use nor a depreciation of the value of their land. Hence, it would be inappropriate and improvident for this Court to grant review on writ of certiorari to the Petitioners who are before it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the Court of Appeals of Maryland should be denied.

Respectfully submitted,



Roger W. Titus,
Attorney for Respondents, Citizens Coordinating Committee on Friendship Heights, Inc., et al.

APPENDIX A

Sec. 59-195. Map amendments—Classification.

Application for amendment of the zoning map may be in the form of:

(a) A local amendment covering a single tract, all portions of which are proposed to be classified in the same zone; or all portions of which are proposed to be classified in one of two alternative zones.

(b) A sectional plan amendment covering a section of the Maryland-Washington Regional District, portions of which may be proposed to be classified in different zones.

(c) A district plan amendment covering the entire Maryland-Washington Regional District within the county.

Sec. 59-199. Same—Contents—Local map amendments.

In case of a local map amendment under section 59-195, the application therefor shall be in such form as the district council may prescribe and shall include the following:

(a) A written statement specifying the following:

(1) The election district and municipality or community in which is located the land proposed to be reclassified, and the street number, if any, or if none the location with respect to nearby public roads in common use.

(2) A description by metes and bounds, courses and distances of the land, or if the boundaries conform to lot boundaries within a subdivision for which a plat is recorded in the land records of the county then the lot, block and subdivision designations with appropriate plat reference.

(3) The present zoning classification of the land, the proposed classification and the alternative classification, if any.

(4) The name and address of the owner of the land.

(5) The area of the land proposed to be reclassified, stated in square feet if less than one acre and in acres if one acre or more.

(6) The application number and the date of application of, and action taken on, all prior applications filed within three years previously for the reclassification of the whole or any part of the land proposed to be reclassified.

(b) An identification plat prepared by a civil engineer, surveyor or other competent person, and certified thereon by him to be correct and in conformity with this subsection, showing by metes

and bounds, courses and distances the land proposed to be reclassified, or if the boundaries conform to lot boundaries within a subdivision for which a plat is recorded among the land records of the county, then a copy of such plat, the land proposed to be reclassified appearing in a color distinctive from that of other land shown on the plat.

(c) A vicinity map shall be furnished by the commission, covering the area within at least one thousand feet of the boundaries of the land proposed to be reclassified to the extent that such area lies within the county or Prince George's County or the District of Columbia, showing the existing classification of all land appearing on the map as shown on the official zoning map on file in the office of the department or the office of the commission and all roads, streets, alleys, parks and other public or governmental areas in public ownership or on public rights of way or proposed on a plan adopted by the commission, and all streams and railroad rights of way within the area covered by the map, and the names thereof.

(d) If the land proposed to be reclassified lies in whole or in part within an area covered by a sectional highway or zoning plan map adopted by the commission, then a copy of such map shall be furnished by the commission.

(e) On the plat and maps required under the above paragraphs, the land proposed to be reclassified shall appear in a color distinctive from that of other land shown thereon. The scale of the plat and map required by the above paragraphs shall be noted thereon and shall be not less than two hundred feet to the inch if the land proposed to be reclassified is of an area of ten acres or less; and not less than four hundred feet to the inch if of an area of more than ten acres. A north direction arrow shall appear on such plat and maps.

(f) Such other relevant information as either the district council or the hearing examiner determines to be necessary to evaluate the impact of a particular application on public facilities, or existing or proposed development in the immediate area of the application.

Sec. 59-200. Same—Same—Sectional and district plan map amendments.

In case of a district zoning plan amendment, the application therefor shall be in such form as is required by law. In the case of a sectional zoning amendment, the application shall include:

(a) The designation or description of the area sufficient to identify the same.

(1) The boundaries of each area proposed for the same classification either by lot, block or subdivision designation with appropriate plat reference where a plat for the subdivision is recorded in the land records of the county, or by streets, roads, streams or other topographic landmarks, or by metes and bounds, courses and distances, as may be most appropriate, together with indications where such classification, if adopted, would result in changes of classification, the nature of the changes and the boundaries of the land covered by such changes.

(2) All roads, streets, alleys, parks, governmental or other public areas in public ownership or on public rights of way or proposed therefor on a plan adopted by the commission, and all streams and railroad rights of way within the area required to be covered by the map, and the names thereof.

(b) A map or maps of the area prepared by a civil engineer, surveyor or other competent person and certified by him to be correct and in conformity with this subsection showing, if the area lies in whole or in part within an area covered by a sectional highway plan map adopted by the commission, a copy of such map. The scale of the maps required under this subsection shall be noted thereon and shall be an appropriate scale not less than four hundred feet to the inch. A north direction arrow shall appear on such map.

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-834

MORTON FUNGER, et al.,

Petitioners

v.

MONTGOMERY COUNTY, MARYLAND, et al.,

Respondents

On Petition For A Writ of Certiorari
To The Court of Appeals of Maryland

BRIEF IN OPPOSITION FOR RESPONDENT, MONTGOMERY COUNTY, MARYLAND

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IN THE
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On Petition For A Writ of Certiorari
To The Court of Appeals of Maryland

BRIEF IN OPPOSITION FOR RESPONDENT,
MONTGOMERY COUNTY, MARYLAND

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (Appendix A of Petition) is reported at 280 Md. 686, 376 A.2d 483. The opinion of the Circuit Court for Montgomery County, Maryland, is reproduced in Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

This respondent has restated the question presented to read as follows:

When a municipal legislative zoning body, as provided by its zoning ordinance, conducts a public hearing to consider legislative facts relating to a comprehensive rezoning, must it accord cross-examination when requested by interested parties?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Applicable provisions of the United States Constitution and of the Montgomery County Zoning Ordinance are set forth in Appendix C of the Petition.

STATEMENT OF THE CASE

Although argumentative, and in some instances inaccurate, the Statement of the Case set forth in the Petition at least presents an acceptable chronology of the legislative and judicial proceedings which preceded this Petition. Respondent Montgomery County adds the following brief statement.

Not all of the properties in Friendship Heights were downzoned by the comprehensive sectional map amendment zoning action

taken by the Montgomery County Council. (P.3 of Petition.) Some properties were accorded a more intense development use by that action. Indeed, although 3.5 acres out of the 18.19 acre Bergdol Tract owned by Petitioners were downzoned, the Friendship Heights Sector Plan recommends that the entire Bergdol Tract be developed in an optional zoning classification designated PD-44 which would accord the Petitioners more density than they had enjoyed prior to the comprehensive zoning action. (Pp. 4 and 9 of Petition.)

The Bethesda-Chevy Chase Master Plan did not recommend intensification of development in Friendship Heights (P. 4 of Petition); rather it called for orderly expansion of the central business district with emphasis on the protection of surrounding singlefamily neighborhoods through the use of park buffer areas and transitional uses. Thus, the Sector Plan and Sectional Map Amendment did not reverse the essential objectives of the General Plan and Bethesda-Chevy Chase Master Plan (P. 6 of Petition); they implemented those objectives by considering all of the properties in Friendship Heights as they relate to each other and to the surrounding neighborhoods.

ARGUMENT

The petitioners contend here that constitutional due process requires a right to cross-examination in a comprehensive zoning proceeding, and particularly when, as they allege, the proceeding results in downzoning. They are attempting to lift to the level of federal constitu-

tionality a decision of the Court of Appeals of Maryland which was based upon a non-federal ground adequate to support that decision. The thorough and well-reasoned opinion of the Court of Appeals demonstrates beyond question that the petitioners' contention is without merit.

1. THE DECISION BELOW, WHICH IS BASED ON NON-FEDERAL GROUNDS, IS CLEARLY CORRECT.

The Court of Appeals of Maryland, in reversing the Circuit Court for Montgomery County in this case, decided a question that had remained unanswered since its holding in Hyson v. Montgomery County, 242 Md. 55, 217 A.2d 578 (1966). In the Hyson case, the Court of Appeals held that in a single-tract, piecemeal zoning hearing in Montgomery County, reasonable cross-examination, if requested, must be permitted. The provisions of the zoning ordinance involved in Hyson are essentially the same as involved in this case. Section 59-204 sets forth hearing procedures and Section 59-207(a) provides that a zoning application shall be decided on the basis of the evidence of record. The zoning provisions do not specifically provide for cross-examination. In Hyson, the Court reasoned that because the zoning action in question involved a single tract of land, Sections 59-204 and 59-207 required the members of the County Council to resolve disputed questions of adjudicative facts (as contra-distinguished from legislative facts) concerning particular parties; and, therefore, a reasonable right of cross-examination must be allowed. Citing 1 Davis, Administrative Law Treatise, §§ 7.02 and 7.05.

The question left unanswered by the Court of Appeals in Hyson was whether or not cross-examination must be allowed in a comprehensive rezoning hearing such as is involved in this case. The Circuit Court for Montgomery County, although it considered the zoning action of the Council to be comprehensive in this case (P. 83a of Petition), held that the Council must allow reasonable cross-examination because the same zoning ordinance hearing requirements applied and the facts elicted were adjudicatory in nature. The Circuit Court went on to say:

> ". . . this Court does not hold that the due process clause of the United States Constitution mandates the result reached. The holding that the right to cross-examine attaches is based purely upon a statutory right as construed in Hyson, supra. Sections 59-204 and 59-207 were enacted by the County Council, and they must abide by the law they enacted. . ." (Emphasis added.) (P. 109a and 110a of Petition.)

In a unanimous decision, the Court of Appeals reversed the Circuit Court pointing out that there is no express requirement in Sections 59-204 or 59-207 that a right of cross-examination must be afforded to interested persons at zoning hearings. The Court explained that Hyson implies the exis-

tence of that right in piecemeal rezoning cases which exists either as a requirement of due process or by reason of the right to a public hearing itself, because the facts to be determined are deemed adjudicative and the Council's function in that instance is quasi-judicial in nature. (P. 42a of Petition.) However, the Court of Appeals went on to resolve the question left unanswered in Hyson by pronouncing that in a comprehensive rezoning case the Council considers legislative facts designed to affect local and regional needs and all property owners within the planning area. (P. 47a of Petition.) This did not require a judicial or trial-type hearing and "there was no constitutional or other right arising from §§ 59-204 and 59-207 to cross-examine witnesses at the sectional map amendment hearings involved in this case." (P. 48a of Petition.)

It is clear that the parameters of this case and the Hyson case are quite narrow and provincial involving an interpretation of the zoning ordinance of Montgomery County. The Maryland Court of Appeals decided in Hyson that in a single-tract zoning case the Montgomery County Council is required by local law to hold a public hearing to resolve adjudicative facts which implicitly includes reasonable cross-examination, when requested, whereas in this case, which involves a comprehensive rezoning, the required hearing calls for the resolution of legislative facts and no quasi-judicial function is involved; hence, no cross-examination is required. (P. 47a of Petition) Since the decision of the Court of Appeals is based on a non-federal ground adequate to support the decision, this Court should decline to grant this petition.

II. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW NOT HERETOFORE DECIDED BY THIS COURT.

Unhappy with the decision of the Court below, the petitioners now ask this Court to revamp the requirements of due process in a legislative proceeding based on the petitioners' misreading of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S.Ct. 2358 (1976). In Eastlake, this Court held that the doctrine that a legislative delegation of power to a regulatory body must be accompanied by discernible standards does not apply to a municipal charter provision which mandated a referendum on any change to an existing land use within the municipality because, rather than being a delegation of legislative power, that charter provision constituted a power reserved by the people to themselves. The practical result is that under the provisions of the charter mandate in Eastlake, a land use change can be effectuated without any hearing at all. An unreasonable result would have the protection of challenge in state court where the scope of the state remedy available to a landowner would be determined as a matter of state law, as well as under Fourteenth Amendment standards. 426 U.S. at 677, 96 S.Ct. at 2363.

Because the land use change in Eastlake apparently did not denigrate the use or depreciate the value of the land involved in that case, the petitioners here, relying strongly on the dissenting opinions in Eastlake, urge that where a

zoning action does denigrate a use or depreciate the value of land, such as they allege to be their situation, then the landowner has a right to a hearing including cross-examination. Their argument fails for several reasons.

First of all, there really is no controversy at all because as stated above, the petitioners cannot demonstrate that their property has been denigrated in use or depreciated in value. Were they to exercise their right under the optional PD-44 use recommended in the Friendship Heights Sector Plan, they would enjoy more density of use than they had under the prior zoning category. (Pp. 67a and 68a of Petition.)

Secondly, the petitioners are not single small parcel owners who have been "spot" zoned without procedural protections such as bothered Justice Powell in his dissent in Eastlake. 426 U.S. at 680, 96 S.Ct. at 2365. They had ample notice and opportunity and indeed exercised their right at numerous and lengthy hearings before the Montgomery County Planning Board and before the Montgomery County Council to present oral and written evidence which they deemed relevant to the comprehensive rezoning of Friendship Heights. There is no indication in the dissent of Justice Powell that a landowner has a further procedural right to cross-examination even in the situation of a single tract, piecemeal rezoning.

Justice Stevens distinguishes the broad, general policies set forth in

the legislative act of comprehensive rezoning from the particular issues involved in piecemeal rezoning and places great deference in the judgment of the legislature in the former situation. 426 U.S. at 683, 684, 96 S.Ct. at 2367. With regard to a piecemeal rezoning, he indicates that fundamental fairness requires that "the interested parties be given a reasonable opportunity to have their dispute resolved on the merits by reference to articulable rules." 426 U.S. at 692, 693, 96 S.Ct. at 2371. However, nowhere in his dissent does he suggest that the rules should include crossexamination.

This Court decided the question involved in this case many years ago in Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445, 36 S.Ct. 141 (1915):

> "where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, witout giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.
>
> * * *
>
> There must be a limit to individual argument in such matters if government is to go on."

This respondent submits that the hearing requirements set forth in the Montgomery County zoning ordinance, which apply both to piecemeal and comprehensive rezoning, fall well within the ambit of Bi-Metallic and amply satisfy the fundamental fairness described by Justice Stevens in his dissent in Eastlake.

This Court recently dismissed for want of a substantial federal question a holding of the Supreme Court of California in San Diego Building Contractors Association v. City Council of San Diego, 529 P.2d 570 (1974), appeal dismissed, 427 U.S. 901, 96 S.Ct. 3184 (1976). In that case, the lower court held that a comprehensive rezoning of a prescribed coastal zone in the city of San Diego constituted a legislative enactment, and as such, there was no due process requirement to afford affected landowners notice and hearing. If there was not a due process requirement for notice and hearing in the California comprehensive rezoning case,

the petitioners in this comprehensive rezoning case, who were afforded notice and ample opportunity to present oral and written evidence at numerous hearings, have no grounds whatsoever to be claiming a further right to cross-examination.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1977

No. 77-834

MORTON FUNGER, et al.,

Petitioners,

v.

MONTGOMERY COUNTY, MARYLAND, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION OF RESPONDENTS THE SPECIAL TAXING DISTRICT OF FRIENDSHIP HEIGHTS AND THE HILLS AND THE FRIENDSHIP HEIGHTS VILLAGE COUNCIL

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION OF RESPONDENTS THE SPECIAL TAXING DISTRICT OF FRIENDSHIP HEIGHTS AND THE HILLS AND THE FRIENDSHIP HEIGHTS VILLAGE COUNCIL

Respondents the Special Taxing District of Friendship Heights and The Hills and the Friendship Heights Village Council respectfully submit that a writ of certiorari should not issue to review the opinion and judgment of the Maryland Court of Appeals entered in this case on July 15, 1977.

OPINIONS BELOW

The opinion of the Maryland Court of Appeals is now reported officially at 280 Md. 686 (1977).

JURISDICTION

Except as discussed in Argument I, *infra*, Respondents are satisfied with Petitioners' jurisdictional statement.

QUESTION PRESENTED

Whether the due process clause of the fourteenth amendment requires that a legislative body considering a comprehensive zoning amendment allow unlimited rights of testimony and cross-examination?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Aside from the constitutional and statutory provisions set forth in the Petition for Certiorari, this case involves Sections 59-122, -195, and -208 of the Montgomery County Code (1972), which are set forth in an Appendix hereto. All references are to the Code sections in force at the time of the zoning actions involved here.

STATEMENT OF THE CASE

With few exceptions the errors Respondents perceive in Petitioners' statement of the case are not material to the question before the Court. Thus, no elaborate rehearsal of the facts is necessary here. A few points, however, require clarification.

Friendship Heights is located on the boundary of Montgomery County, Maryland and the District of Columbia. The actions of the Montgomery County Council which form the basis for this case involved the zoning of the entire Maryland portion of Friendship Heights, including all of the property forming the Friendship Heights central business district and the Friendship Heights special taxing district.

It is essential to note that, before taking the actions complained of, the Montgomery County Council had before it evidence accumulated in a decade and a half of hearings before the Planning Commission and before the Council itself. At the final hearing which resulted in the rezonings in question here, the Council kept the record open until all parties, including Petitioners, had had an opportunity to submit both oral and written testimony. Moreover, opportunities to rebut any evidence presented at the hearing were also afforded to Petitioners by the Council.[1]

ARGUMENT

I. PETITIONERS' FAILURE TO RAISE THEIR CONSTITUTIONAL CLAIM BEFORE THE MARYLAND COURT OF APPEALS DEPRIVES THIS COURT OF JURISDICTION OVER THIS CONTROVERSY

For a party to obtain review in this Court of a state court decision on grounds that it offends the Federal Constitution, it is essential that the constitutional claim have been presented to and decided by the highest state court. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Bailey v. Anderson*, 362 U.S. 203 (1945); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368 (1836); *see* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4022

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[1] There is no estimate as to the total pages of testimony taken or materials produced in all these proceedings. Suffice it to say that the total record *extract* before the Maryland Court of Appeals consisted of nearly 5,000 pages. The hearing (on the preliminary Sector Plan) lasted five days, involved nearly one hundred witnesses and produced a transcript in excess of 1,300 pages in addition to documentary material. The Sector Plan hearings in 1974 involved over seventy witnesses, a transcript of over 500 pages and numerous written documents.

(1977). Unless the record shows that the federal question was raised and decided in the state court, this Court lacks jurisdiction. *Cardinale*, 394 U.S. at 438. Moreover, when the state court has failed to rule on the federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

The record here shows no indication that the federal constitutional issue which Petitioners raise before this Court was presented to or decided by the Maryland Court of Appeals. Instead, this entire proceeding has been a dispute over the procedures required by Maryland state and Montgomery County law. This was made explicit in the opinion of the Montgomery County Circuit Court which stated:

> The Court should clarify its ruling. First of all, *this Court does not hold that the due process clause of the United States Constitution mandates the result reached.* The holding that the right to cross-examine attached is *based purely upon a statutory right . . . .*[2]

Petitioners' brief in the Court of Appeals did not address itself to any federal constitutional issues.[3] Indeed, their brief specifically denied that this case bears any relationship to *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), which Petitioners now claim supports review.[4] The Petitioners' own statement of the issues

[2] *In re* Application No. F-947, For Amendment to the Zoning Ordinance Map, Law No. 40639 (Montgomery County, Md. Circuit Court July 15, 1976) (Petition for Certiorari at 109a-110a) (emphasis added).

[3] The constitutional argument was apparently made to the Circuit Court, which found no reason to reach it. In their appeal, Petitioners abandoned this claim, choosing to rely entirely on statutory grounds to support the Circuit Court's decision. *See* Connecticut Mutual Life Insurance Co. v. Moore, 333 U.S. 541, 544 (1948).

[4] "[This case] is a challenge of a zoning action of the sort contemplated in *Euclid* v. *Ambler* 272 U.S. 365 (1926) and other similar cases, and has no relationship to the issues decided in *Eastlake*." Brief for Appellees—Cross-Appellants, Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 376 A.2d 483 (1977) at 19.

presented to the Maryland Court of Appeals was specifically limited to questions of interpretation of the Montgomery County Code[5] and their brief to that court did not contain any citation to the Federal Constitution. Not surprisingly, the Maryland Court of Appeals did not address itself to the question raised here of whether the U.S. Constitution required the Montgomery County Council to afford Petitioners unlimited testimony and cross-examination.[6] The constitutional issue, therefore, was first fully raised in this Court. Under this Court's established precedents, Petitioners' failure to make their constitutional argument below deprives this Court of jurisdiction and the Petition for a Writ of Certiorari must be denied.

[5] The single question presented by Petitioners below was:

> Whether the County Council violated the requirements of the Montgomery County Zoning Ordinance when it deprived owners of property downzoned of their right to reasonable cross-examination of witnesses and a reasonable opportunity to be heard in the proceedings on Sectional Map Amendment Application No. F-947.

Brief for Appellees—Cross-Appellants, *supra* note 4, at (iii).

[6] The Court of Appeals' only mention of this issue is a passing reference to *Eastlake*, indicating that this Court had approved rezoning actions taken without a hearing. *See* Montgomery County v. Woodward & Lothrop Inc. [hereinafter C of A Opinion], 280 Md. 686, 713-14, 376 A.2d 483, 498 (1977) (Petition for Certiorari at 48a). Mere passing reference to a constitutional point does not constitute full, reasoned consideration.

II. PETITIONERS HAVE NOT RAISED ANY IMPORTANT QUESTIONS OF FEDERAL LAW IN THEIR ATTACK UPON THE PROCEDURES FOLLOWED BY THE MONTGOMERY COUNTY COUNCIL.

A. Petitioners Misconstrue This Court's Decision in City of Eastlake v. Forest City Enterprises, Inc.

Petitioners now base their argument regarding the importance of the procedural issues they perceive in this case upon this Court's recent decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). In *Eastlake*, a city charter provision requiring that all zoning amendments be approved by a 55% vote in a referendum was upheld against arguments that it constituted an improper delegation of legislative authority and violated the due process clause of the fourteenth amendment. U.S. const. amend. XIV, § 1. Petitioners argue (Petition for Certiorari at 13-15) that the *Eastlake* decision turned on the fact that the property owner there was seeking to "upzone" the tract (i.e., increase the permissible intensity of use), while the Council's action in this case, at least in part, "downzoned" Petitioners' land (i.e., decreased the intensity of use allowed). In support of their position, Petitioners identify two footnotes in the Court's opinion in *Eastlake* which note that no downzoning was present there.[7] Neither footnote, however, is concerned with the applicability of the due process clause; instead they discuss possible grounds for seeking either a hardship exception to the zoning ordinance, or its overturning on substantive due process grounds. Justice Stevens' dissent even more forcefully indicates that the character of the zoning change was not

[7] *Eastlake*, 426 U.S. at 674 n. 8, 679 n. 13.

dispositive in *Eastlake*. Commenting on the theory that since only an upzoning had been denied, the property owner had not been deprived of any constitutionally cognizable property interest, Justice Stevens wrote: "The Court does not adopt any such rationale . . . On the contrary, throughout this litigation everyone has assumed, without discussing the problem, that the Due Process Clause does apply."[8]

Although the entire Court agreed that procedural due process had to be afforded to citizens affected by a zoning decision, there is no suggestion, even in dissent, that the full panoply of procedures appropriate to trial-type or judicial proceedings be required before a legislative body exercises its zoning powers. Both dissenters only demanded a fair opportunity for affected landowners to be heard. *See Eastlake*, 426 U.S. at 680 (Powell, J., dissenting), 426 U.S. at 692-94 (Stevens, J., dissenting). As shown in Argument II(B), *infra*, Petitioners were manifestly provided with ample opportunity to present their positions, satisfying the demands of the *Eastlake* dissenters.

Furthermore, the fears which prompted the dissenters in *Eastlake* are not present here. The decision here involved numerous parcels of land covering a substantial area, instead of the single tract at issue in *Eastlake*. Thus, the procedure below did not focus on "the status of a single small parcel owned by a single 'person'." *Eastlake*, 426 U.S. at 680 (Powell, J., dissenting). Also, rather than being presented in a referendum to a possibly uninformed electorate unhampered by established decisionmaking stan-

[8] *Id.* at 681 (Stevens, J., dissenting). Petitioners do not argue and the record does not show that the value of their property in fact has been denigrated by the rezoning. As the Maryland Court of Appeals indicated, a higher total density may be possible for Petitioners' property under the current zoning than was available before. *See* C of A Opinion, 280 Md. at 724, 376 A.2d at 504 (Petition for Certiorari at 67a-68a). Thus, they are not aided by the distinction of *Eastlake* they argue.

dards, the issues here were determined by the Montgomery County Council, a legislative body whose decision was made on the basis of articulated findings subject to substantive review. *See* C of A Opinion, 280 Md. at 699-701, 376 A.2d at 491-92 (Petition for Certiorari at 20a-24a); Montgomery County Code § 59-208 (1972).

In addition, the Petitioners are fully protected against arbitrary treatment to the same extent that this Court found the petitioners were in *Eastlake*. Were the challenged amendment to lack a substantial relation to the exercise of the County's police power goals, a substantive due process argument would lie against it. *See* 426 U.S. at 676-77. Indeed such an argument was made to and rejected by the Maryland Court of Appeals. C of A Opinion, 280 Md. at 706-07, 376 A.2d at 494-95 (Petition for Certiorari at 34a-36a).[9] Also, were the zoning plan to work an individual hardship, individual relief would be available through application to the county board of appeals under Montgomery County Code § 59-122 (1972); *see* 426 U.S. at 674 n. 9, 679 n. 13. Thus, ample avenues are open to Petitioners to remedy any abuses committed by the Council. As the Court held in *Eastlake*, "[t]hat being so, nothing more is required by the Constitution." 426 U.S. at 677 (footnote deleted).

B. The Procedures Followed By the County Council Did Not Deprive Petitioners of the Due Process of Law

As the opinion of the Maryland Court of Appeals demonstrates, the decision at bar was arrived at following lengthy proceedings held in accordance with a detailed statutory pattern. *See* C of A Opinion, 280 Md. at 693-701, 376 A.2d at 488-92 (Petition for Certiorari at 9a-24a). Contrary to

[9] In this Court, Petitioners only argue the denial of a purely procedural right. No representation is made that the rezoning lacks the substantial relationship to the public welfare necessary to its validity. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

Petitioners' assertions, these procedures provided ample protection for their interests, fully complying with any constitutional requirements.

As this Court has held, the type of procedures necessary to assure due process vary with the character of the proceeding in question. *See Bi-Metallic Investment Co. v. Board of Equalization*, 239 U.S. 441 (1915);[10] *Duquesne Light Co. v. EPA*, 481 F.2d 1, 5-6 (3d Cir. 1973). The Court of Appeals applied this principle in its procedural determinations here. In *Hyson v. Montgomery County*, 242 Md. 55, 217 A.2d 578 (1966), the Maryland Court of Appeals had ruled that property owners were entitled to cross-examine opposing witnesses in hearings involving piecemeal, or single parcel, rezoning.[11] Although Petioners argued that the *Hyson* rule should be extended to the hearing on the Friendship Heights rezoning, the Court of Appeals declined to do so. Following the Montgomery County ordinance,[12] the court carefully distinguished the piecemeal rezoning in *Hyson* from the broader rezoning of a "substantial" area present here. C of A Opinion, 280 Md. at 702-06, 376 A.2d at 493-94 (Petition for Certiorari at 26a-34a).[13] In fact, the rezoning affected

[10] In *Bi-Metallic*, Justice Holmes wrote (239 U.S. at 445):

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. Generally statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard . . . . There must be a limit to individual argument in such matters if government is to go on.

[11] *Hyson* was decided entirely on statutory grounds without reference to federal constitutional requirements.

[12] Montgomery County Code § 59-195 (1972).

[13] Petitioners suggest (Petition for Certiorari at 20) that the Friendship Heights rezoning lost its comprehensive character because in-

the entire Village of Friendship Heights, a far cry from the parcel-by-parcel dispute Petitioners suggest occurred.

In these circumstances, a rezoning affecting development of an important commercial and residential area of the County, the Council properly determined that the relevant facts would be those concerning the entire area, rather than relating to individual tracts as would be considered in piecemeal rezoning. Moreover, the Council was aware that the proposed rezoning would affect large numbers of people, many of whom might wish to adduce evidence at a hearing.[14] In these circumstances, allowing unlimited oral testimony and cross-examination would entail an endless hearing. Instead, each landowner was allowed eight minutes of direct testimony and unlimited time at the end of the hearing to rebut any previous testimony. In addition, those wishing to appear were permitted to pool their times to allow more complex presentations. Finally, unlimited written presentations were allowed.[15]

There is no suggestion that the mass of material adduced at the hearings was not considered by the Council. Petitioners also do not suggest that they were in fact prevented from presenting any relevant material to the Council. Under the circumstances, the procedures adopted

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dividual tracts were separately characterized on the sectional map amendment. They fail to recognize the distinction between the overall zoning decision which they contest and the mere implementation of the policy determination through the sectional map.

[14] In fact, almost 200 people did appear at the hearings on the proposed zoning. The spectre of a hearing with that many participants having unlimited rights to present testimony and cross-examine any other participant shows the necessity of the sort of limitations the Council adopted.

[15] Contrary to Petitioners' assertion that no opportunity was afforded to cross-examine Planning Board staff members (Petition for Certiorari at 7), parties, including Petitioners, were invited at the hearings before the Planning Commission to submit written questions to the staff.

by the Council, as the Court of Appeals held,[16] provided ample protection for Petitioners' rights.

CONCLUSION

Petitioners' failure to properly assert a federal claim in the Maryland courts prevents them from now doing so here. In any event, their contention that an important federal question arises from the reasonable limitations placed on oral presentation and cross examination by the Montgomery County Council in this legislative proceeding is unsupported by this Court's decision in *Eastlake* or any other decision. To the contrary, the opinion of the Maryland Court of Appeals conclusively shows that Petitioners had ample opportunities to present their positions to the Council. The Constitution requires no more. Therefore, Respondents submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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[16] 280 Md. at 710-16, 376 A.2d at 497-99 (Petition for Certiorari at 42a-52a).

APPENDIX

Provisions of the Montgomery County Code (1972)

Sec. 59-122. Filing of petition; action of board or director.

(a) Filing of petition. Petitions for the grant of special exceptions shall be filed with the board, or when appropriate the director, on forms provided therefor. The petitioner shall submit plans and specifications or other data or explanatory material, stating the methods by which he will comply with the conditions specified for each grant of special exception. At the time of filing his request for a grant of special exception the petitioner shall pay to the board the fee set out in the board's rules of procedure, or when appropriate to the director the fee provided in subsection (d) of section 59-120.

(b) Notice of action. Notice of action taken by the board or the director, as the case may be, on each petition for special exception shall be transmitted to the petitioner, to the commission and to the director. In cases where special exceptions have been granted, the notice shall set forth the conditions, standards and safeguards or rules to which the special exception is subject.

(c) Zoning map to indicate special exception. Upon receipt of a notice of a grant of special exception, the commission shall indicate the same in the proper place on the zoning map by use of appropriate code number or symbol. (Mont. Co. Code 1965, § 111-34; 1972 L.M.C., ch. 16, § 5.)

Sec. 59-195. Classification.

Application for amendment of this chapter may be either proposals for amendment of the text of this chapter or proposals for amendment of the zoning map. A proposed amendment may be for a more or less intensive use and may be in form of:

(a) A local amendment covering a single tract, all portions of which are proposed to be classified in the same

zone; or all portions of which are proposed to be classified in one of two alternative zones.

(b) A sectional plan amendment covering a section of the Maryland-Washington Regional District, portions of which may be proposed to be classified in different zones.

(c) A district plan amendment covering the entire Maryland-Washington Regional District within the county. (Mont. Co. Code 1965, § 111-38; Ord. No. 6-34, § 1.)

Sec. 59-208. Same—Resolution; opinion and vote.

(a) The decision of the district council remanding to the examiner, approving, denying or dismissing any application for a map or text amendment shall be made in open session and shall be rendered within sixty days of the hearing or transmittal of the hearing examiner's report, whichever occurs later, unless such time is extended by the district council. The affirmative vote of five members of the district council shall be required to adopt the resolution granting a classification other than that recommended for the subject property on a detailed water shed or planning area master plan lawfully approved by the district council; provided, that in the event the classification sought is recommended for approval by the planning board, then the affirmative vote of four members shall be required to adopt the resolution granting the classification. In all other cases, an application shall not be granted except by the affirmative vote of four members of the district council. If the necessary total of affirmative votes as herein provided shall fail to be achieved for any reason, the application shall be held to be denied; no resolution need be adopted for such a denial and the minutes shall so reflect the denial for want of the necessary affirmative vote total. Any such denial for want of the necessary total of affirmative votes shall not be subject to the time limitation set forth in section 59-197. All resolutions adopted hereunder shall be accompanied by an opinion of the district council setting forth its conclusions and reasons which shall be filed in the application record.

A copy of the resolution and opinion shall be promptly mailed by the department to the applicant, the commission and to all persons entering their appearance at the hearing as shown by the hearing transcript; and a copy shall be promptly furnished by the department to the chief of the division of assessments, of the department of finance and the members of the board.

(b) The time for appeal from a final decision of the district council, including a denial for want of the necessary total of affirmative votes, as set forth in section 85-78A, shall begin to run from the date of the resolution or from the date the application was denied for want of the necessary total of affirmative votes, except as otherwise provided in section 59-209. (Mont. Co. Code 1965, § 111-49; Ord. No. 6-34, § 1.)